(1)

89-1299

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DON G. BLACKWELL,

Petitioner,

vs.

CITY OF ST. LOUIS, MISSOURI

and

WILLIAM C. DUFFE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

Must there be an established unconstitutional policy before a challenged action creates municipal liability under 42 U.S.C. §1983 for a single unconstitutional action by the highest policymaking body of a municipality?

Where the highest policymaking body of a municipality orders the unconstitutional suspension of a public employee union officer because of his exercise of free speech, does the fact that the body was acting in a quasi-judicial capacity, as opposed to a quasi-legislative capacity, preclude imposition of liability on the municipality under 42 U.S.C. §1983?

LIST OF PARTIES

At the time of the ruling below which Petitioner now seeks to have reviewed, Don G. Blackwell was the Plaintiff-Appellant. The Defendant-Appellees were the City of St. Louis, a municipal corporation, and William C. Duffe, the City's Director of Personnel, who was sued in his individual and official capacities. The Missouri Court of Appeals ruled that Mr. Duffe was entitled to qualified immunity and since Petitioner does not seek review of that ruling, Mr. Duffe remains a defendant only in his official capacity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases Cited

Constitutional Provisions Cited

Statutes Cited

Other Citations

OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Eastern District, review of which is sought here, is reported at 778 S.W.2d 711 (Mo. App. 1989). A copy of the opinion is attached in the Appendix at p. A-1. The unreported opinion of the Circuit Court of the City of St. Louis (Twenty-Second Judicial Circuit) dated August 30, 1988 is attached in the Appendix at p. A-18 (LF 242-3).[1/] An earlier opinion of the Missouri Court of Appeals Eastern District, with regard to Court I, Petitioner's claim for administrative review of the St. Louis Civil Service Commission, is reported at 726 S.W.2d 760 (Mo. App. 1987). The unreported order of the Circuit Court of the City of St. Louis dated November 8, 1985 on Count I is attached in the Appendix at p. A-27 (LF 183). The unreported decision of the Civil Service Commission of the City of St. Louis dated March 11, 1985 is attached in the Appendix at p. A-29 (LF 100-03).

JURISDICTION

The Missouri Court of Appeals, Eastern District, rendered its judgment in an opinion dated August 15, 1989. Mr. Blackwell's timely Motion for Rehearing and/or Transfer to the Missouri Supreme Court was denied by the Court of Appeals on September 13, 1989. See App. 34. His timely Application for Transfer was denied by the Missouri Supreme Court on November 14, 1989, making the August 15, judgment of the Court of Appeals final. Rule 83.02, Missouri Rules of Civil Procedure. See App. 35.

Since this Petition has been filed within 90 days of November 14, 1989, this Court has jurisdiction by virtue of 28 U.S.C. §1257(3).

1/References to the Appendix appear "App. . ." and to the Legal File which was the record on appeal before the Missouri Court of Appeals appear "LF. . . . ."

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS

U.S. Const., Amendment I, provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for a redress of grievances."

U.S. Const., Amendment XIV, §1, provides:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprieve any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

Section 1 of the Civil Rights Act of 1971, 17 Stat. 13, 42 U.S.C. §1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

Article XVIII, §19 of the Charter of the City of St. Louis and Rule XV, §3(b) of the Rules of the Civil Service Commission in almost identical language provide:

"Section 19. Political activity of classified employees. — No person holding a position in the classified service shall use his official authority or influence to coerce the political action of any person or body, or to interfere with any election, or shall take an active part in a political campaign, or shall seek or accept nomination, election or appointment as an officer of a political club or organization, or serve as a member of a committee of any such club or organization, or circulate or seek signatures to any petition provided for by any primary or election law, or act as a worker at the polls, or distribute badges, color or indicia favoring or opposing a candidate for election or nomination to a public office, whether federal, state, county or municipal. But nothing in this section shall be construed to prohibit or prevent any such person from becoming or continuing to be a member of a political club or organization or from attendance upon political meetings, from enjoying entire freedom from all interference in casting his vote, from expressing privately his opinions on all political questions, or from seeking or accepting election or appointment to public office, provided, however, that no active campaign for election shall be conducted by any employee unless he shall first resign from his position."

Rule XV, §6 of the Rules of the Civil Service Commission provides:

"**Section 6.** VIOLATIONS; PENALTIES:

In every case where it shall come to the attention of the Director that any employee in the classified service, subject to Article XVIII and these rules, has engaged in political or other activities forbidden under these rules and Article XVIII, he shall conduct an investigation and upon the completion of the same present his findings to the Commission at its next regular

meeting thereafter. The Commission, following a review of the findings, may conduct a complete investigation and hearing; if the Commission finds that the employee has been guilty of a violation of the act and these rules, it shall order immediate dismissal of the employee and shall instruct the Director to so inform the Comptroller."

STATEMENT OF THE CASE

Events Giving Rise to Claims

Petitioner, Don G. Blackwell, in the Fall of 1984, was a 30-year veteran of the St. Louis, Missouri Fire Department, holding the rank of Battalion Chief (LF 38). Prior to the incident involved in this case, Blackwell had never had any disciplinary action taken against him. He was, and had been for 11 years, president of Local 73 of the International Association of Firefighters, the certified representative of St. Louis firemen (LF 39).

On October 5, 1984, Blackwell, attired in a business suit, attended the regular meeting of the Board of Aldermen, the legislative body of the City. It was the Board's last chance to override a mayoral veto of a bill to provide increased pension benefits for firefighters. Blackwell was present to lobby for aldermanic support for the override attempt, but he ended up one vote short (LF 42-43).

After the meeting, Blackwell was approached by five or six reporters from local newspapers and television stations who questioned him concerning his reaction to the failed override attempt. In an article headlined "Firefighters Union to Put Heat on Alderman James Shrewsbury" appearing in the **St. Louis Post-Dispatch** on October 6, 1984, Blackwell was quoted as saying about Shrewsbury, "I'm sure the firefighters will be acting in preventing his re-election. His opposition to the bill was adamant, and he brought up many things that weren't even related to the bill. There were

other aldermen who opposed our bill, but they didn't criticize our efforts." (Civil Service Commission Hearing, City Exhibit 1, App. 39). On October 10, 1984, Blackwell was quoted in a **Southside Journal** article headlined, "Firefighters Union Targets Shrewsbury Over Pension Issue" as saying that the union would "be active in preventing his reelection" (CSC Hearing, City Exhibit 2, App. 41).

On October 16, 1984, Director of Public Safety, Thomas R. Nash, wrote a letter to Director of Personnel, William Duffe, complaining about the quoted statements of Blackwell concerning Alderman Shrewsbury. He concluded his letter, "In light of the blatant and public threat of political annihilation of an elected City official by a City employee whose job is protected by Civil Service rules, I respectfully request the Civil Service Commission to convene at its earliest convenience to clarify the rule." (Exhibit B to Answer to Plaintiff's First Interrogatories No. 21, App. 59, LF 157, 178). The matter was also called to Duffe's attention by several other individuals. (Answer to Plaintiff's First Interrogatories No. 21, App. 58, LF 156-157).

Duffe, in turn, operating under Article XVIII, Section 25 of the City Charter and Civil Service Rule XV §6 (supra at p. 3) commenced an investigation which included taking a sworn statement from Blackwell before a court reporter on December 13, 1984 (CSC Hearing, City Exhibit 3, App. 45, LF 63), Blackwell stated that he did not recall making the statements about Alderman Shrewsbury attributed to him. At the conclusion of the statement, Duffe, in response to a question from Blackwell's counsel, said:

> "Let me speak hypothetically because I don't want to make the statement on the record that I think you made a political threat against Alderman Shrewsbury. I think that depends upon, you know, what you said here today and what the newspapers said and what the reporters might be willing to back up. But I would see

threatening an elected official with political activity that is prohibited by the Charter as a political act that's proscribed by the Charter and the Rules. Am I clear?" CSC Hearing, City Exhibit 3, LF 73-74)

On February 4, 1985, Blackwell was summoned before a hearing by the Civil Service Commission to answer charges that he had violated Article XVIII, §19 of the City Charter and Rule XV, §3(b) of the Civil Service Rules. At the hearing, counsel for Blackwell filed a position statement contending that Blackwell's conduct did not violate the Charter or Rules and that his speech was protected under the First Amendment. (See App. 36, LF 58-59). In pertinent part it provides:

> "Finally, we assert that Mr. Blackwell's comments were 'pure speech' upon matters of public concern and are entitled to the greatest constitutional protection under the First Amendment. Disciplinary action against him for such comments cannot be justified by the limited interests of the City in regulating the 'political activity' of Civil Service employees.
>
> Mr. Blackwell submits that any disciplinary action against him in connection with the alleged comments would violate his First Amendment rights to freedom of speech." (App. 38, LF 59).

Additionally, Blackwell's counsel in opening and closing statements reasserted Blackwell's protection under the First Amendment (LF 4-5, 51-53).

Administrative Actions

On Feberuary 12, 1985 the Civil Service Commission rendered its Decision finding a violation of the Charter and Rule XV §3(b) and ordering a 28-day suspension for Blackwell. Findings VI through IX set out below are crucial to Blackwell's free speech claim and to the issue of whether the Civil Service Commission was acting to set policy.

VI.

"Chief Blackwell's statement constituted a threat of active political opposition by Fire Fighters during Alderman Shrewsbury's re-election campaign. Chief Blackwell was in a position, by virtue of his office, to influence or coerce subordinate Fire Fighters to further political acts in violation of the foregoing.

VII.

Further, said threats could be construed as a warning to other public officials of possible political retribution by Fire Fighters should said officials take a position contrary to the desires of the Fire Fighters.

VIII.

Further, said threats, if allowed to go undisciplined, would be interpreted as permissible, along with other prohibited acts which would be necessary to carry out such threats.

IX.

Chief Blackwell did not attempt to mitigate his threat by apology or offer to make a public retraction." (App. 31).

On or about March 1, 1985, Duffe published the March 1985 edition of **Newsgram,** a publication of the Department of Personnel distributed to the City employees. See Plaintiff's First Request for Admissions Directed to Defendants No. 34 and Defendant's Response (App. 63, 69, LF 112-147). It contained an article headlined, "Political Threat Gets Batt. Chief 28-Day Suspension" and stated in part as follows:

"In charges brought to the Commission, the Department of Personnel accused the Firefighter of public statements that members of the Fire Department would work for the defeat of 16th Ward Alderman James Shrewsbury. Such statements, which were published in

local newspapers, constitute political activity that is forbidden to Civil Service employees, the Commission found."

See Exhibit G to Plaintiff's First Request for Admissions Directed to Defendants (App. 61, LF 135).

In discovery, Plaintiff asked Interrogatory No. 9 and got the following answer:

> "9. Set forth each and every interest or purpose served by or intended to be served by the publishing and distribution of the article regarding Plaintiff's suspension which appeared in the Department of Personnel Newsgram attached to Plaintiff's Petition as Exhibit E.
>
> Answer: To point out to City employees, through the **Newsgram,** that the Department of Personnel and Civil Service Commission are prepared to take serious steps against those who would violate their responsibilities as set out in the Charter and Rules and that they are not going to continue to issue mere warnings on the subject."

(Plaintiff's First Interrogatories to Defendants, App. 62, LF 152.)

Litigation History

On April 5, 1985, Blackwell filed a four-count petition. Count I sought court review of the Civil Service Commission Decision under Section 536.010 of the Revised Statutes of Missouri. Count I alleged violations of Blackwell's rights under the First and Fourteenth Amendments of the United States Constitution and Article 1, Section 10 of the Missouri Constitution, as well as challenging the Commission's findings and conclusions as not being supported by competent and substantial evidence upon the entire record. Count II sought a declaratory judgment to hold the Charter and Rules provisions at issue to be unconstitutional. Count

III sought relief under 42 U.S.C. §1983 based on the unconstitutional discipline applied to Blackwell. Count IV alleged a violation of state law protecting the rights of public employees to unionize, Section 105.510 of the Revised Statutes of Missouri.

After Count I was briefed and argued by the parties, based on the record before the Civil Service Commission, the Circuit Court for the City of St. Louis on November 8, 1985 issued an order holding that the findings and decision of the Commission were "unsupported by competent and substantial evidence upon the whole record" and therefore reversed its decision (App. 27, LF 183).

The City and Civil Service Commission appealed. In the meantime, Blackwell retired. On appeal, Blackwell argued the constitutional issues as an alternative basis for upholding the Circuit Court. The Missouri Court of Appeals, Eastern District affirmed without reaching the constitutional issues. 726 S.W.2d 760.

Blackwell thereafter on March 18, 1988 filed his Second Amended Petition which restated Count I and maintained Count III only against the City and Duffe (App. 87, LF 192). Counts II and IV were deleted. The defendants filed their joint answer on April 4, 1988 (App. 97, LF 212). In answer to paragraph 35 of the Second Amended Petition, Defendants admit that the actions of the Commission members, Duffe and the City were taken under color of the statutes, ordinances, regulations, custom and usage of the State of Missouri and the City of St. Louis. They deny the allegation that their actions were taken "pursuant to and in implementation of the official policies, ordinances and regulations" of the City. Paragraph 37 alleges that the City and Duffe, in promulgating, maintaining, and enforcing Article XVIII, §19 of the Charter and Rule XV, §3(b) of the Civil Service Rules against Blackwell and other classified employees and in suspending Blackwell because of his activ-

ities at the Board of Aldermen meeting on October 5, 1984 were intentionally violating, interfering with and chilling the exercise of the rights of Blackwell and other classified employees to freedom of speech, assembly and petitioning the City government for redress of grievances under the First Amendment. In paragraph 39, Blackwell alleges deprivation of his right to free speech on matters of public concern, as well as freedom of association, and to petition the City government, without justification of any compelling City interest. In paragraph 40, Blackwell alleges that the actions of the City and Duffe have stigmatized him, caused him to lose wages and benefits, and that he has suffered emotional distress, humiliation and embarrassment.

The City and Duffe moved for summary judgment on Count III on April 4, 1988 (LF 216). Duffe claimed qualified immunity. Blackwell moved for partial summary judgment on the issue of the City's liability on June 23, 1988 (LF 217). On August 30, 1988, the Circuit Court granted summary judgment to the City and Duffe and denied Blackwell's motion for partial summary judgment as moot (App. 18, LF 242). On the issue critical here the Circuit Court ruled:

> "The City policy, as embodied in Section 19 of Article XVIII of the City Charter and Rule XV, Section 2b [sic] of Civil Service, if enforced properly as it was here (even tho [sic] later reversed on factual grounds) does not amount to a violation of Plaintiff's constitutional rights of free speech, free assembly and freedom to petition. Therefore, Defendant City is not liable under 42 U.S.C. §1983. **(City of St. Louis v. Praprotnik,** 56 L.W. 4201 (U.S. 1988))."

Blackwell pursued a timely appeal to the Missouri Court of Appeals, Eastern District. On August 15, 1989, the Court of Appeals affirmed the judgment of the Circuit Court. The issue as framed by the Court of Appeals was:

"The basic issue here is whether §1983 liability may be imposed upon the City based on the Commission's incorrect decision to suspend plaintiff. Our answer is no." 778 S.W.2d at 714-15.

The court traced the "uncertain history" of municipal liability under §1983. The Court of Appeals discussed this Court's opinions in **Monell v. Department of Social Services,** 436 U.S. 658, 98 S. Ct. 2018 (1978); **Pembaur v. City of Cincinnati,** 475 U.S. 469, 106 S. Ct. 1292 (1986); and **City of St. Louis v. Praprotnik,** 485 U.S. 112, 108 S. Ct. 915 (1988). The Court of Appeals held that the **Praprotnik** plurality opinion had distilled four guideline principles to determine when a single decision may be sufficient to establish an unconstitutional municipal policy. It then went on to state:

"To us, these guidelines narrow Justice Brennan's pluarality opinion in **Pembaur.** In **Pembaur,** Justice Brennan stated a single, isolated decision taken by the municipality's final policymaker in the area in question is, **ipso facto,** the policy of the municipality; and, therefore, that single decision makes the municipality susceptible to §1983 liability. Not so under the guidelines distilled by Justice O'Connor in **Praprotnik.** Under those guidelines 'the challenged action must have been taken pursuant to a policy adopted' by the final policymaker in order to subject the municipality to §1983 liability. **Thus, there must be an established policy before a challenged action creates §1983 liability."** 778 S.W.2d at 716 (emphasis supplied).

After discussing the concurring opinion of Justice Brennan in **Praprotnik,** the Court of Appeals went on to say:

"Where the Court will go from **Praprotnik** we do not know. However to us, the concept of municipal liability under §1983 expressed in Justice O'Connor's plurality opinion in **Praprotnik** makes more sense than the con-

cept expressed in Justice Brennan's plurality opinion in **Pembaur."** 778 S.W.2d at 717.

The court then correctly assumed, based on the City Charter, that the Civil Service Commission was the final policymaker concerning the political activity of City employees. 778 S.W.2d at 717. The court then asserted:

> "Having authority to make final policy, however, does not make the Commission's single decision here the final policy in the area in question. The Commission's duties are 'mainly quasi-legislative and judicial'. (citation omitted) The Commission's adoption of its Rule XV, §3(b) was the Commission acting in its rule-making, quasi-legislative and, thus, policymaking capacity. Sensibly read, this Rule is the City's final policy concerning political activity of City employees." 778 S.W.2d at 717.

The court then reasoned that the procedure adopted by the Commission to enforce its Rule was not "defective". Since Blackwell complained about the decision rendered by the Commission acting in its quasi-judicial capacity and not the process, and since the court felt the record did not show the Commission was doing anything more than attempting to "apply the policy reflected in its Rules," it found no constitutional violation. It stated:

> "Moreover, the record simply discloses the Commission incorrectly applied its Rule. There are no operative facts to show this was done by conscious misdirection, subterfuge or conspiracy to avoid the Rule . . . It incorrectly applied the rule it adopted. Nothing more, nothing less. Thus, the challenged action was not 'taken pursuant to a policy adopted by the . . . officials responsible . . . for making final policy for' the City. **Praprotnik, supra,** 108 S. Ct. at 924. There simply was no policy to prohibit plaintiff from making the statements he did." 778 S.W.2d at 718.

The court then went on to disavow the distinction it had just drawn for analytical purposes between quasi-legislative and quasi-judicial actions by the Commission:

> "We do not mean nor intend to imply that a decision reached, as it was here, through the exercise of the quasi-judicial function is necessarily exempt from §1983 liability. We need not and do not address that issue here. We expressly noted the Commission's exercise of its quasi-judicial function simply as additional and significantly relevant evidence showing its decision was an attempt to apply an already established policy." 778 S.W.2d at 718.

With regard to Director of Personnel Duffe, the Court of Appeals held he was entitled to qualified immunity. 778 S.W.2d at 719-20.

Raising and Preservation of Federal Questions

As was pointed out above at p. 6, at his Civil Service Commission hearing, Blackwell filed a position statement (App. 36, LF 58-59) raising the First Amendment issue. His counsel's opening and closing statements also reiterated this position (LF 4-5, 51-53). He next raised the issue in his Petition filed on April 5, 1985 (App. 72, LF 78, see especially Count III. The federal issues were reasserted in Count III of the Second Amended Petition filed March 18, 1988 (App. 87, LF 192). The Circuit Court and the Court of Appeals ruled squarely on Blackwell's §1983 claims, each denying his claims on the merits. App. 18 and 6-15, LF 242 and 778 S.W.2d 711, at 714-720.

ARGUMENT

Introduction

Petitioner claims his constitutional rights to free speech, free assembly and to petition the City government for redress, as protected by the First and Fourteenth Amendments to the Constitution, have been violated by the 28-day sus-

pension meted out to him by the St. Louis Civil Service Commission as a result of his appearance before the Board of Aldermen on October 5, 1984, and more particularly because of his answers to questions of members of the media. As the president of St. Louis Fire Fighters Local 73, he was present to lobby for the override of a mayoral veto of favorable pension legislation. In answer to questions from five or six reporters, Blackwell stated that firefighters would either be "active" or "acting" in seeking to prevent the re-election of Alderman James Shrewsbury, who opposed the bill and the override attempt. Blackwell argued that under this Court's balancing test adopted in **Pickering v. Board of Education,** 391 U.S. 563, 88 S. Ct. 1731 (1968) and reaffirmed in **Connick v. Myers,** 461 U.S. 138, 103 S. Ct. 1684 (1983), and more recently in **Rankin v. McPherson,** . . U.S. . ., 107 S. Ct. 2891 (1987), his constitutional rights were violated. Blackwell's speech concerning the public resolution of the override attempt was clearly a "matter of public concern" as evidenced by the number of television and newspaper reporters seeking his reaction. Just as clearly, the City could never have met its burden of establishing that its interests outweighed the interests of Blackwell and the public in having this issue aired. The Court of Appeals avoided the issue by holding that the imposition of the suspension did not represent the official policy of the City.

Special and Important Reasons for Granting Review

1.

The Missouri Court of Appeals has decided an important federal question regarding municipal liability under 42 U.S.C. §1983 in a way that conflicts with:

A. Applicable decisions of this Court.

B. Decisions of Federal Courts of Appeals.

C. Decisions of other State Courts.

A.

Conflict with This Court

The Missouri Court of Appeals' interpretation of this Court's decision in **City of St. Louis v. Praprotnik,** 485 U.S. 112, 108 S. Ct. 915 (1988), as requiring the existence of an established policy before a challenged action creates §1983 liability not only misreads and conflicts with this Court's **Praprotnik** ruling but also its previous decisions in **Owen v. City of Independence,** 445 U.S. 622, 100 S. Ct. 1398 (1980) and **Pembaur v. City of Cincinnati,** 475 U.S. 469, 106 S. Ct. 1292 (1986) and the more recently decided case of **Jett v. Dallas Independent School District,** .. U.S. .., 109 S. Ct. 2702 (1989).

In **Owen,** the municipality was held liable for the action of its legislative body in denying Mr. Owen's protected liberty interest in his reputation without due process. In footnote 13 the Court specifically held the City was liable to Owen for the actions of the City Council as the government doing something to him. 445 U.S. at 333 fn. 13, 100 S. Ct. at 1407-7. The injury to Blackwell here is very similar to the "systemic" injuries described by Justice Brennan, i.e. an injury that results "not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith." 445 U.S. at 652, 100 S. Ct. at 1416. If Blackwell cannot recover from the City for his unconstitutional suspension, there is no other defendant left in the suit from whom he may recover.

In **Pembaur,** the municipality was held liable for the single act of an official, an attorney, whose conduct was said to represent the official policy of the municipality. In Part II-A of this Court's opinion in which six justices joined, the Court stated:

". . . (a) government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. **More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only one or to be taken repeatedly.** To deny compensation to the victim would therefore be contrary to the fundamental purpose of §1983." 475 U.S. at 481, 106 S. Ct. at 1299 (emphasis supplied).

Here, there is no doubt, and the City cannot possibly contend to the contrary, both that the Civil Service Commission is the body responsible for establishing St. Louis policy regarding the political activities of City employees, since it adopted the Rules in question, especially Rule XV, §3(b) and §6, and also that the Commission, and only the Commission, can administer discipline for a violation of its Rule. See Rule XV, §6. The Commission here is the alter ego of the City. If the Commission's imposition of the suspension here is not the action of the City, then whose action is it? The "official policy" and "final policymaker" legal fictions were created as shorthand expressions to define what actions can be said to be properly attributable to a legal "person" (a municipality) that can only act through human agents. Here, the Civil Service Commission is the only municipal actor on the stage. It legislates, executes, and judges concerning the political acts of public employees of the City. Here it judged and "executed" Blackwell. Any holding that the City is not responsible for the "execution" would be a cruel hoax concerning the constitutional "rights" of public employees.

This Court's decision in **Praprotnik** even more clearly demonstrates the Missouri Court's misinterpretation and misapplication of this Court's jurisprudence on municipal liability for constitutional torts. The plurality opinion noted the reason for insisting that local governments could only be liable for the results of unconstitutional governmental "policies" arose out of the language and history of §1983. The Court harkened back to the "crucial terms" of §1983 providing for liability when a government 'subjects [a person], or causes [that person] to be subjected' to a deprivation of constitutional rights." . . U.S. . . , 108 S. Ct. at 923. What this Court has reiterated in every decision since **Monell** is that liability is **not** to be imposed on a **respondeat superior** basis. Petitioner here is not seeking **respondeat superior** liability. The City of St. Louis acted against him in this case in the only way and through the only instrumentality it could, through the decision of the Civil Service Commission.

In **Praprotnik,** seven justices agreed that Mr. Praprotnik's supervisor, Frank Hamsher, did not possess sufficient authority to establish final employment policy for the City of St. Louis. See 108 S. Ct. at 927 (plurality) and at 933 (Justice Brennan). The same seven justices would have held the City subject to liability had the Civil Service Commission ordered the same transfer. See 108 S. Ct. at 925 (plurality) and at 932-33 (Justice Brennan). The plurality stressed that "the authority to make municipal policy is necessary the authority to make **final** policy." 108 S. Ct. at 926 (emphasis in original). Since the Commission's decision to punish Blackwell was the first, last and only decision of the City on the issue, by the only body empowered to act, it necessarily represented **final** policy.

Here, even more than in **Praprotnik,** there is additional evidence to suggest that the Commission was attempting more than **ad hoc** retaliation for undesirable action; it was

attempting to send a message to others. See the March 1985 **Newsgram** article published by the City (App. 61, LF 135) and remember the Answer to Interrogatory 9 as to the reason for the publication, i.e. "To point out to City employees, through the **Newsgram,** that the Department of Personnel and Civil Service Commission are prepared to take serious steps against those who violate their responsibilities as set out in the Charter and Rules and that they are not going to continue to issue mere warnings on the subject." (App. 62, LF 152). Thus, the City has admitted making an example of Blackwell for the benefit of all other City employees. With a pre-emptive strike, the City has effectively chilled any public speech critical of an alderman under the guise of calling the speech a prohibited political threat. There is no likelihood of repetition sufficient to create an unlawful "custom", especially in view of the "industrial capital punishment" (discharge) provided for by Rule XV, §6 for any violation.[2/]

The Commission's action meets all the criteria required by either the plurality or the concurrence in **Praprotnik** for establishing the existence of final policy made by a final policymaker.

The Court in **Jett** reiterated and clarified **Monell, Pembaur, Praprotnik** on when final policy is made. Five justices agreed with the following statement contained in Part IV of the Court's opinion:

> "Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether **their** decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur . . ." 109 S. Ct. at 2723.

2/One ground for the City's appeal in the first state court case was because Blackwell should have been discharged rather than given a 28-day suspension. See 726 S.W.2d at 764, note 3.

In **Jett,** the Court remanded the case for a determination of whether the school superintendent possessed final policymaking authority in the area of employee transfers, and if so, to determine whether a new trial was required, 109 S. Ct. at 2724. Again, the concern was to avoid mere **respondeat superior** liability, a concern that does not arise here.[3/]

B.

Conflict with the Federal Courts of Appeals

A cursory review of the plethora of very recent cases decided by several Federal Courts of Appeals discloses decisions that actually conflict or that conflict in principle with the Missouri Court of Appeals' holding. In fact, the Federal Courts of Appeals have not hestitated to hold individual municipal functionaries to be final policymakers in cases involving seemingly isolated decisions. If these cases are wrongly decided, the need for immediate and clear guidance from this Court is patent.

In **City of St. Louis v. Praprotnik,** 879 F.2d 1573 (8th Cir. 1989), the Eighth Circuit on remand specifically held the Civil Service Commission to possess "primary policymaking authority for making general personnel policy **and for making final decisions as to individual employees. Its decisions in these respects can fairly be said to be decisions of the city."** 879 F2d at 1575-6 (emphasis supplied). Mr. Praprotnik's claim of unlawful transfer was denied because the Commission, not his supervisor, was the final policymaker on individual decisions.

3/The recent case of **City of Canton v. Harris,** .... U.S. ....., 109 S. Ct. 1197 (1989), also sheds light on the issue here. On the "failure to train" claim, this Court rejected the contention that only unconstitutional policies are actionable under §1983. **Canton,** however, involved an act of omission rather than commission and is thus not fully apposite here.

In **Williams v. Butler,** 863 F.2d 1398 (8th Cir. 1988) (en banc), **cert. den.** . . U.S. . . , 109 S. Ct. 3215 (1989), after two remands from this Court, the Eighth Circuit held that a municipal judge had final employment policymaking authority with regard to the decision to discharge an employee. "Because he was given final policymaking authority, Butler was in effect, the city; his actions were the city's actions." 863 F.2d at 1403. So too here, the Civil Service Commission's actions were the City's.

In **Zook v. Brown,** 865 F.2d 887 (7th Cir. 1989), the sheriff was held to be the final policymaker regarding employment decisions in a free speech case.

In **Gobel v. Maricopa County,** 867 F.2d 1201 (9th Cir. 1989), the court held a complaint stated two viable theories that the county attorney had final policymaking authority with regard to arrest procedures. 867 F.2d at 1206-09.

In **Rosenstein v. City of Dallas,** 876 F.2d 392 (5th Cir. 1989), the chief of police was held to be a final employment policymaker and the §1983 verdict against the city was upheld. 876 F.2d at 397.

In **Starrett v. Wadley,** 876 F.2d 808 (10th Cir. 1989), the county assessor made final employment policy regarding the discharge of an employee in retaliation for her exercise of free speech but not with regard to his sexual harassment of her. 876 F.2d at 818-20.

In **Melton v. City of Oklahoma City, 879** F.2d 706 (10th Cir. 1989), the city manager was the final policymaker regarding any employment decisions. 879 F.2d at 725.

In **Ware v. Unified School District 492,** 881 F.2d 906 (10th Cir. 1989), the court reversed a judgment n.o.v. granted against a plaintiff who prevailed on a free speech claim, holding that the superintendent and/or the school board itself were the final policymakers. 881 F.2d at 912-03.

In **Crowder v. Sinyard,** 884 F.2d 804 (5th Cir. 1989), the court held the evidence sufficient to establish that county sheriffs and the city police were final policymakers regarding the conduct of their subordinates outside their respective jurisdictions (remanded for court, not jury, determination of the issue). 884 F.2d at 828-9.

The most recent case Petitioner could find commenting on the issue raised here is **Mandel v. Doe,** 888 F.2d 783 (11th Cir. 1989), which upheld a $500,000 jury award in favor of a prisoner based on a physician's assistant's final policymaking decision to deny him medical treatment. The district court had directed a verdict in the plaintiff's favor on liability. Citing **Pembaur, Praprotnik** and **Jett,** the court found its job to first determine those individuals whose decisions represent the official policy of the local government, ensuring "the municipal official possesses the authority and responsibility for establishing **final** policy with respect to the issue in question. Only after that is the second step of the inquiry relevant. Did the challenged decision or act of the official cause the deprivation of the plaintiff's rights? The answer to this question is, of course, for the jury." 888 F.2d at 783 (emphasis in original, citations omitted).

The above decisions demonstrate a clear conflict between the Missouri Court of Appeals and at least the Courts of Appeals for the Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits.

C.

Conflict with Other State Courts

The Missouri Court of Appeals' decision conflicts with those of courts of appeals in recent cases in Minnesota and in Texas. In **Clough v. Ertz,** 442 N.W.2d 798 (Minn. App. 1989) the appeals court reversed a grant of summary judgment to a city. It held that a city council's single act could be the basis for §1983 liability despite the failure of evi-

dence to show a practice of unlawfully terminating employees because of their free speech.

In **City of Houston v. DeTrapani,** 771 S.W.2d 703 (Tex. App. 1989) the Texas court held a sign administrator to be a final policymaker concerning the issue of proper signage. In comment on the current state of the law, the court observed, "It is clear that we simply have no definitive holding upon which to rely in deciding where to look for the placement of policymaking authority. Nor is it unreasonable to suspect that the (U. S. Supreme) Court will continue to wrestle with its own §1983 jurisprudence for the foreseeable future." 771 S.W.2d at 707.

2.

Need for Additional Guidance from This Court

Given the litigation explosion under §1983, and the diversity of lower court opinion regarding the establishment of municipal liability for a single action or decision, additional guidance from this Court is again needed. The fact that the members of this Court have been split in their reasoning and that nc recent decision until **Jett** commanded the support of a majority of the Justices, has led to much confusion as to the state of the law. This in turn produces widely varying judicial resolutions of similar questions. As a result, practicing attorneys have little or no confidence in the advice they give their clients. The problem must be particularly perplexing for those advising governmental bodies and officials. Additional guidance from this Court should result in considerable savings of judicial time and resources.

Finally, if one unconstitutional act can never establish a municipal policy, a clear holding to that effect should be issued. In **Owen** and **Pembaur** this Court held that one act by a final policymaker could subject a municipality to §1983 liability. If one act is **per se** insufficient to be an "act of policy," then what quantitative test is applicable? The

"policy" requirement for §1983 liability, as first explicated in **Monell** and as restated in various formulations since then, was not intended to create "one-act immunity," no matter how egregious the constitutional violation. Rather, it was intended to save municipalities from liability for the acts of officials (especially middle and lower level functionaries) who may exceed their authority or act contrary to established policy.

Where, as here, the single act of the final policymaker patently appears to be not an isolated decision, but an intentional indication of future retaliation for protected political speech, there is all the more reason for this Court to exercise its discretion to grant review and to reverse the decision and renounce the reasoning of the Missouri court.

3.

Novel and Unprecedented Approach of Missouri Court of Appeals

In making distinctions based on quasi-judicial as opposed to quasi-legislative action by a municipal policymaking body, the Missouri Court of Appeals is plowing new ground. As far as Petitioner's research has shown, this approach is completely novel and totally without support in §1983 jurisprudence. Not surprisingly the Court cites no cases to support itself and then purports to disavow its reliance on the distinction. Nevertheless, the distinction is at the heart of the court's ruling, and it should not be permitted to stand unreviewed.

CONCLUSION

The first question presented for review here is similar to the issues left undecided in **Praprotnik, supra,** and two other recent cases. As Justice Brennan said in his concurring opinion:

"Finally, I think it is necessary to emphasize that despite certain language in the plurality opinion suggesting otherwise, the Court today need not and therefore does not decide that a city can only be held liable under §1983 where the plaintiff 'proves the existence of an unconstitutional municipal policy.' Just last term, we left open for the second time the question of whether a city can be subjected to liability for a policy that while not unconstitutional in and of itself, may give rise to unconstitutional deprivations." . . U.S. . . ., 108 S. Ct. at 936.

This case properly presents timely and important issues for review. For the reasons stated, a Writ of Certiorari should issue to review the judgment of the Missouri Court of Appeals, Eastern District, in this case.

Respectfully submitted,

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89-1299

No. .....

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

DON G. BLACKWELL,
Petitioner,
vs.
CITY OF ST. LOUIS, MISSOURI
and
WILLIAM C. DUFFE,
Respondents.

APPENDIX

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APPENDIX

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION FOUR

DONALD G. BLACKWELL, Plaintiff/Appellant, vs. CITY OF ST. LOUIS and WILLIAM DUFFE, Defendants/Respondents.	No. 55600 Appeal from the Circuit Court of the City of St. Louis Hon. Robert G. Dowd, Jr. Opinion Filed: August 15, 1989

This case comes before this Court for the second time. The facts, in more detail, may be found in the Court's first opinion. **Blackwell v. City of St. Louis,** 726 S.W.2d 760 (Mo. App. 1987).

In the present case, plaintiff, Donald Blackwell, a fire fighter employed by the defendant City of St. Louis (City), appeals from a denial of his motion for partial summary judgment and from a grant of summary judgment against him and in favor of the defendant City and defendant William Duffe (Duffe), the City's Director of Personnel. We affirm the trial court's judgment.

In support of his appeal, plaintiff has filed a legal file of 248 pages. Neither plaintiff nor defendants, however, have expressly designated the specific evidence submitted to the trial court in the summary judgment proceeding in that court. Plaintiff, apparently, did "support . . . [his] motion" for summary judgment in the trial court by "refer[ing] the Court to his brief . . . , the pleadings . . . , and the Court's file on this matter." Defendants made no designation at all in support of their motion. It is not our function to sift through the material now furnished us to determine what evidence the trial court used to reach its judgment.

The less precise the record is, the greater the difficulty in properly resolving the issues. In a number of prior opinions, this Court has outlined the proper method for designating the record for summary judgment in the trial court and, in turn, on appeal. E.g. **Johnson v. Johnson,** 764 S.W.2d 711, 713 (Mo. App. 1989). Having said this, we take the present record as we find it.

At the time of the incidents in question, plaintiff was a veteran fire fighter who held the position of Battalion Chief in the City's Fire Department and also served as president of Local 73 of the St. Louis Fire Fighters, AFL-CIO. In his capacity as union president, plaintiff attended an October 1984 meeting of the City's Board of Aldermen at which a proposal to increase the fire fighters' pension was defeated, when an attempt to override the Mayor's veto failed.

Following the vote on the proposal, plaintiff was approached by members of the news media, who interviewed him for his reaction. Subsequently, two newspaper articles about the meeting included comments, purportedly made by plaintiff, regarding Alderman James Shrewsbury, an opponent of the pension proposal. An article in the St. Louis Post-Dispatch quoted plaintiff as saying, "I'm sure the Fire Fighters will be acting in preventing his [Shrewsbury's] election." Several days later, an article in the South Side Journal quoted plaintiff as saying the Union would "be active in preventing his [Shrewsbury's] re-election."

According to the briefs, the City's Director of Public Safety, Thomas Nash (Nash), filed charges against plaintiff. Plaintiff was subpoenaed to appear before and was questioned by defendant Duffe, the City's Director of Personnel, as part of an investigation by Duffe. Plaintiff was represented by counsel. Subsequently, plaintiff appeared at a hearing before the City's Civil Service Commission (Commission). Again, plaintiff was represented by counsel. The Commission rendered its decision based upon written Findings of Fact and Conclusions of Law.

The Commission found as "fact" that: plaintiff did state to the press "that St. Louis Fire Fighters would work to prevent the re-election of Alderman James Shrewsbury"; this "statement constituted a threat of active political participation by the Fire Fighters during Alderman Shrewsbury's re-election campaign;" plaintiff "was in a position, by virtue of his office, to influence or coerce subordinate Fire Fighters to further political acts"; and these "threats could be construed as a warning to other public officials of possible political retribution by Fire Fighters should [these] officials take a position contrary to the desires of the Fire Fighters." The Commission concluded that plaintiff's "public threat against . . . Shrewsbury" is "conduct and speech by a Battalion Chief" prohibited by §19, Article XVIII of the City's Charter and Rule XV, §3(b) of the Commission's Civil Service Rules, each of which provides:

> No person holding a position in the classified service shall use his official authority or influence to coerce the political action of any person or body, or to interfere with any election, or shall take an active part in a political campaign . . . But nothing in this section shall be construed to prohibit or prevent any such person . . . from expressing privately his opinions on all political questions . . .

The Commission ordered that plaintiff be suspended without pay for 28 days.

Plaintiff then filed a four-count petition in the circuit court joining, as defendants, the City, Duffe, Nash and the individual members of the Commission. In Count I of his petition, plaintiff sought review of the Commission's decision pursuant to our Administrative Procedure Act (APA), Chap. 536 RSMo 1978. By agreement, this Count was submitted separately to the circuit court. The court reversed the Commission's order, concluding "the findings and deci-

sion of said Commission are unsupported by competent and substantial evidence upon the whole record." On appeal, this Court affirmed, holding there was no substantial evidence that plaintiff actually coerced others or actively engaged in political activity. **Blackwell, supra,** at 763. According to defendants' brief, plaintiff was awarded back pay as a result of prevailing on Count I.

Plaintiff continued to prosecute his §1983 action, Count III, against defendants Duffe and the City.[1/] In this action, plaintiff alleges the Commission and Duffe, under color of law and pursuant to official policy, "intentionally" took actions against plaintiff "in retaliation against Plaintiff" for exercising his First Amendment rights, and those actions "deprived Plaintiff of his right to freedom of speech on matters of public concern . . ." More generally, plaintiff alleges the Commission and Duffe "in promulgating, maintaining and enforcing [the Charter and Commission Rules] against Plaintiff and other classified employees, and in suspending Plaintiff for 28 days . . . are intentionally violating, interfering with, and chilling the exercise of the [First Amendment] rights of Plaintiff and other classified employees . . ." In their joint answer, the City and Duffe denied these allegations and alleged several affirmative defenses: election of remedies, estoppel, and, as to Duffe, official (qualified) immunity.

1/43 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Defendants then filed a joint motion for summary judgment, plaintiff filed a motion for a partial summary judgment against the City on the issue of liability. The circuit court granted defendants' motion and, having done so, found plaintiff's motion to be moot. Plaintiff's appeal followed.

Defendants raise several procedural issues, each of which, they argue, must be resolved in their favor, making a decision on the merits of plaintiff's appeal unnecessary. We dispose of those issues first.

Relying on **James v. City of Jennings,** 735 S.W.2d 188, 190 (Mo. App. 1987), defendants contend the trial court lacked jurisdiction to hear plaintiff's §1983 claim, plaintiff's Count III, because, at the time plaintiff filed this claim, he had not exhausted his administrative remedy, plaintiff's Count I. This lack of jurisdiction was not cured by plaintiff's subsequent exhaustion of his administrative remedy, defendants contend, because a court's jurisdiction depends on facts existing at the time its jurisdiction is invoked. Since this Court's appellate jurisdiction is derived from the trial court's jurisdiction, defendants reason, this Court has no jurisdiction to act because the trial court had no jurisdiction to act.

Defendants' reliance on **James** is misplaced. In **James,** this Court held there was no jurisdiction to entertain a §1983 action for damages brought by plaintiffs, who had decided to forego judicial review, under Chapter 536 RSMo 1986, of an administrative decision denying an occupancy permit. **Id.** The Court refused to allow a collateral attack that would "by-pass the judicial review procedures" provided by Chap. 536, our Administrative Procedure Act (APA). **Id.** In the present case, by contrast, plaintiff did not attempt to by-pass the APA. The APA is the basis of his

Count I. He was pursuing his administrative and §1983 remedies simultaneously and, by agreement, fully pursued his administrative remedy, obtaining a reversal of the Commission's decision, before proceeding with his §1983 action, Count III.

More important, for defendants to prevail on this argument, we would be required to hold that administrative review must be pursued to final judgment before a §1983 action may even be filed in our courts. That holding would be contrary to the teaching of **Felder v. Casey,** . . U.S. . . ., 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988). In **Felder,** the Supreme Court held a state notice-of-claim statute conflicted with the remedial objectives of §1983 and was preempted pursuant to the Supremacy Clause when a §1983 action was filed in state court. Although states have the authority to prescribe rules and procedures that govern suits in their courts, "that authority does not extend so far as to permit States to place conditions on the vindication of a federal right." 108 S.Ct. at 2311. Defendants' argument is, thus, not persuasive.

Defendants raise three other procedural issues, election of remedies, double recovery and collateral estoppel, none of which has merit. We do not address these in detail, however, because plaintiff does not prevail on the merits.

The basic issue here is whether §1983 liability may be imposed upon the City based on the Commission's incorrect decision to suspend plaintiff. Our answer is no.

Municipal liability under §1983 has had an uncertain history, **See City of St. Louis v. Praprotnik,** 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); **Pembaur v. City of Cincinnati,** 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1988); **Monell v. Department of Social Services,** 436 U.S. 65, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); **see also,**

Williams v. Butler, 863 F.2d 1398 (8th Cir. 1988).[2/] This history may be a specific reflection of general differences of opinion "over the scope of citizens' ability to recover for violation of their constitutional rights by governments and their officials." Williams, **The Constitutional Vulnerability of American Local Government,** 1986 Wisc.L.R.83, 128.

In **Monell v. Department of Social Services, supra,** the Department of Social Services and Board of Election of the City of New York had an official policy compelling pregnant employees to take unpaid leaves of absence before those leaves were required for medical reasons. 98 S.Ct. at 2020. This policy constituted a constitutional tort. The Court held the City of New York and other municipalities were "persons" under §1983 and, thus, could be sued directly under that statute where the action alleged to be unconstitutional "implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers." 98 S.Ct. at 2036. In addition, the Court pointed out that §1983 also authorizes suits "for constitutional deprivation visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." **Id.** at 2036.

The Court rejected the use of the doctrine of **respondeat superior,** concluding that municipalities could be held liable only when an injury was inflicted by a government's "lawmakers or by those who edicts or acts may fairly be said to represent official policy." **Id.** at 2037-38. The Court, how-

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2/The decisions in the **Williams** case by the 8th Circuit Court of Appeals were vacated and remanded twice by the Supreme Court. The Supreme Court remanded the first decision for reconsideration in light of **Pembaur, supra.** Then, the Circuit Court's decision on remand was vacated for further re-consideration in light of **Praprotnik, supra.**

ever, made no attempt to define "official policy" and left the "full contours" of municipal liability under §1983 to be developed further on "another day". 98 S.Ct. at 2038.

Subsequently, in **Pembaur v. City of Cincinnati, supra,** the court considered whether a single decision of a municipal official could subject the municipality to liability under §1983. County deputy sheriffs were instructed by the county prosecutor to forcibly enter a doctor's office to serve capias warrants in violation of the doctor's Fourth Amendment rights. By acting as "final decision maker for the County", the prosecutor made the county susceptible to §1983 liability by a single decision. 106 S.Ct. at 1301.

The majority expressed three separate views on the ultimate theory of municipal liability. Justice Brennan, in his plurality opinion, stated that "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." 106 S.Ct. at 1298. He explained:

> [A] government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decision makers, it surely represents an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly.
> **Id.** at 1299.

As examples of a City being held liable under §1983 for a single decision by a policy making body, he cited **Owen v. City of Independence,** 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), in which the City Council passed a

resolution firing the plaintiff without a pretermination hearing, and **Newport v. Fact Concerts, Inc.,** 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981), in which the City Council cancelled a license permitting a concert because of a dispute over the content of the performance. **Id.** at 1298. "Even a single decision" by a City's properly constituted legislative body may trigger §1983 liability, he stated, "because even a single decision by such a body unquestionably constitutes an act of official government policy." **Id.** at 1298.

However, municipalities, like other government entities, often spread policymaking authority among various officials. A municipality is liable under §1983 only for a decision made by the official responsible for establishing the final governmental policy, **Id.** at 1299, and whether an official has policymaking authority is a question of state law. **Id.** at 1300. Thus,

> [M]unicipality liability under §1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.
> **Id.** at 1300.

The Court addressed the issue again in **City of St. Louis v. Praprotnik, supra.** In that case, the plaintiff, an employee of the City of St. Louis, sued the City under §1983 alleging that his First Amendment rights had been violated by the City when the City transferred and later laid him off in response to his appeal of an earlier suspension.

Justice O'Connor, in a plurality opinion, did not completely endorse the plurality opinion and the teaching of **Pembaur.** Reviewing the relevant cases, she stated that in **Owen** and **Fact Concerts,** "[w]e . . . **assumed** . . . an un-

constitutional governmental policy could be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business." **Id.** at 923. (Emphasis Added) In **Pembaur,** she stated, the Court undertook to define more precisely when a single decision may be enough to establish an unconstitutional municipal policy. The Court, she noted, "was unable to settle on a general formulation" in that case. Nonetheless, she distilled "several guideline principles" from Justice Brennan's plurality opinion in **Pembaur.** These principles were:

1. [M]unicipalities may be held liable under §1983 only for acts for which the municipality itself is actually responsible, "that is, acts which the municipality has officially sanctioned or ordered".

2. [O]nly those municipal officials who have "final policymaking authority" may by their actions subject the government to §1983 liability.

3. [W]hether a particular official has "final policymaking authority" is a question of **state law.**

4. [T]he challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in **that area** of the city's business. (Emphasis Theirs)
Id. at 942.

To us, these guidelines narrow Justice Brennan's plurality opinion in **Pembaur.** In **Pembaur,** Justice Brennan stated a single, isolated decision taken by the municipality's final policymaker in the area in question is, **ipso facto,** the policy of the municipality; and, therefore, that single decision makes the municipality susceptible to §1983 liability. Not so under the guidelines distilled by Justice O'Connor in **Praprotnik.** Under those guidelines, "the challenged action must have been taken pursuant to a policy adopted" by the

final policymaker in order to subject the municipality to §1983 liability. Thus, there must be an established policy before a challenged action creates §1983 liability.

This interpretation squares with Justice O'Connor's limited concurrence in **Pembaur.** In that case, she stated:

> As the City of Cincinnati freely conceded, forcible entry of third-party to effect an arrest was standard operating procedure [at the time of the break in]. Given this procedure was consistent with federal, state and local law at the time the case arose, **it seems fair to infer that respondent county's policy was no different.** (Emphasis Added)
> 106 S.Ct. at 1304.

Justice Brennan's understanding of Justice O'Connor's guidelines, apparently, is the same as ours. In concurring only in the result reached in **Praprotnik,** he took vigorous exception to her reading his plurality opinion in **Pembaur** as requiring the challenged action to be part of an already established policy, Thus, he stated:

> In [**Owens** and **Fact Concerts**] we neither required nor, as the plurality suggests, assumed that these decisions reflected generally applicable "policies" as that term is commonly understood, because it was perfectly obvious that the actions of the municipalities' policymaking organs, whether isolated or not, were properly charged to the municipalities themselves.
>
> . . . .
>
> [J]ust as in **Owen** and **Fact Concerts** we deemed it fair to hold municipalities liable for the isolated, unconstitutional acts of their legislative bodies, regardless of whether those acts were meant to establish applicable "policies", so too in **Pembaur** four of us concluded that it is equally appropriate to hold municipalities accountable for the isolated constitutional in-

> jury inflicted by an executive final municipal policymaker, even though the decision giving rise to the injury is not intended to govern future situations.
> **Id.** at 932.

Where the Court will go from **Praprotnik** we do not know. However, to us, the concept of municipality liability under §1983 expressed in Justice O'Connor's plurality opinion in **Praprotnik** makes more sense than the concept expressed in Justice Brennan's plurality opinion in **Pembaur.**

Plaintiff reads the Supreme Court decisions differently than we do. He apparently finds no difference in the views expressed in those opinions. To him, there is a single view: the one expressed by Justice Brennan. Thus, plaintiff premises his argument on that view and the principle created by it.

Plaintiff contends the Commission is the City's final policymaker for hiring, firing and disciplining City employees. The Commission's decision to discipline him, plaintiff argues, involved a "deliberate choice", made from alternative courses of action; for example, plaintiff suggests the Commission could have chosen not to discipline him. This single decision, made by the City's final policymaker in the area in question, violated his First Amendment rights, plaintiff reasons and, thus, subjects the City to liability under §1983.

Arguably, the Commission is the City's final policymaker concerning prohibition of political activity by City employees. The Commission is authorized to make employment policy on behalf of the City. City Charter, Art. XVIII, §7A. More specifically, it is given authority to make and enforce personnel rules, propose ordinances and conduct investigations of personnel. These multiple functions give the Commission flexibility to make choices and take various courses of action concerning personnel. Moreover, in **dicta**

in **Praprotnik, supra,** a plurality of the Court analyzed the City's Charter and specifically determined the City's personnel policy is made either by the mayor and aldermen or by the Commission. 108 S.Ct. at 926-27. For our purposes here, we assume the Commission was the final policymaker concerning the political activity of City employees.

Having authority to make final policy, however, does not make the Commission's single decision here the final policy in the area in question. The Commission's duties are "mainly quasi-legislative or judicial." **Kirby v. Nolte,** 164 S.W.2d 1 (Mo. banc 1942). The Commission's adoption of its Rule XV, §3(b) was the Commission acting in its rule making, quasi-legislative and, thus, policymaking capacity. Sensibly read, this Rule is the City's final policy concerning political activity of City employees.

To properly carry out its Rule and, at the same time, to assure employees of due process, the Commission apparently established a procedure to guard against the Rule being ignored or cavalierly violated. For example, Duffe's questioning of plaintiff appears to be a proper pretermination hearing. No decision was made by Duffe, nor could it be made until plaintiff was given a procedurally acceptable hearing before the Commission. A hearing before the Commission was held and was procedurally correct. Plaintiff was represented by counsel before Duffe and before the Commission. Thus, plaintiff does not complain his hearings were procedurally defective.

Plaintiff's complaint rests on the decision reached by the Commission not the process used to reach it. But, to reach its decision, the Commission was acting in its quasi-judicial capacity. The Commission did not operate in a vacuum or start with a clean slate. There is nothing in the record to show the Commission was attempting to do anything more than apply the policy reflected in its Rules. For example, in

its Findings of Fact and Conclusions of Law, the Commission makes specific reference to its application of the Charter provisions and its identical Rule.

Moreover, the record simply discloses the Commission incorrectly applied its Rule. There are no operative facts to show this was done by conscious misdirection, subterfuge or conspiracy to avoid the Rule. The Commission found, as fact, that plaintiff did make the statements quoted in the newspapers. These statements, the Commission inferred, constituted use of his official authority and influence "to coerce" the political activity of subordinate fire fighters, other public officials, and the Board of Aldermen. This Court disagreed with that reasoning. The Rule, the Court said, prohibits the use of official authority "to coerce the political action of any person or body . . ." **Blackwell v. City of St. Louis, supra,** 726 S.W.2d at 763. But, the Court found no evidence that plaintiff "actually coerced, intimidated or pressured anyone". **Id.** at 763, and it found no evidence to show plaintiff's "official capacity placed him in a position to actually coerce others by means of discharge, discipline, transfer or reassignment." **Id.** at 763. Whether this evaluation by the Court is a characterization of the Commission's findings and conclusions as an improper weighing of evidence, incorrect reasoning, a mistake of fact, a mistake of law or a mistake about a mixed question of fact of law, does not change the basic character of the Commission's action. It incorrectly applied the Rule it adopted. Nothing more, nothing less. Thus, "the challenged action" was not "taken pursuant to a policy adopted by the . . . officials responsible . . . for making final policy for" the City. **Praprotnik, supra** at 924. There simply was no policy to prohibit plaintiff from making the statements he did.

We do not mean nor intend to imply that a decision reached, as it was here, through the exercise of the quasi-judicial function is necessarily exempt from §1983 liability.

We need not and do not address that issue here. We expressly noted the Commission's exercise of its quasi-judicial function simply as additional and significantly relevant evidence showing its decision was an attempt to apply an already established policy.

Moreover, we do not read the language of the Rule as a "precatory admonition" by the Commission to insulate itself and the City from liability based on acts inconsistent with that policy. See **Praprotnik, supra,** at 927. This is not to say that the City could not be held liable for a series of similar actions by the Commission. Nothing precludes a plaintiff from using a series of similar decisions to show this practice is, in fact, the municipal policy although it is not authorized by the written Rule. **Id.** at 927.

Finally, we must address a relevant issue not raised by parties. Our Courts consistently characterize a quasi-judicial decision not based on substantial evidence as an "arbitrary and capricious" decision. **E.g. Blackwell v. City of St. Louis, supra,** 726 S.W.2d at 763. Whatever that characterization means in other contexts, it is insufficient here to raise a prima facie showing that the Commission intended to establish a different and unacceptable policy contrary to the policy established by its written Rule. Plaintiff had ample notice and opportunity to use discovery to establish operative facts supporting this inference. He failed to do so.

Plaintiff next contends Duffe was not entitled to qualified immunity, and, therefore, the trial court's grant of summary judgment on this ground was error. We disagree.

Government officials performing discretionary functions generally are shielded from "civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." **Anderson v. Creighton,** 483 U.S. 635, 107 S.Ct. 3034, 3038 (1987) 97 L.Ed.2d 523; **Harlow v. Fitzgerald,** 457 U.S.

800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Whether an official is immune "generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken". **Id.** "Clearly established" means the right the official is alleged to have violated "must have been 'clearly established' in a . . . particularlized, . . . sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." **Id.** at 3039. An official who "reasonably but mistakenly" concludes his conduct to be constitutionally permissible "should not be held personally liable." **Id.** In addition, this defense of "qualified immunity" should be resolved at the earliest stage in the process, and, therefore, it is an appropriate issue to be resolved by summary judgment. **E.g. Harlow v. Fitzgerald, supra,** 102 S.Ct. at 2737-2738.

In the present case, plaintiff alleges that Duffe, acting under color of state law and pursuant "to City policy," questioned plaintiff; this questioning was done "intentionally in retaliation against Plaintiff for the exercise of his" First Amendment rights and "deprived" plaintiff of those rights, causing him injury. The City's Charter, however, charged Duffe with the duty to make investigations concerning the enforcement of the Charter. Art. XVIII, §9(j). More important, Duffe did not suspend plaintiff, the Commission did. Thus, the relevant question here is an objective question, albeit a fact — specific question: whether a reasonable Director of Personnel could have believed Duffe's questioning of plaintiff to be lawful, "in light of clearly established law and the information (Duffe) possessed." **Anderson, supra,** at 3040.

To answer this question, plaintiff's conclusory allegations are not meaningful. **See, e.g. Wakup v. Brown,** 637 S.W.2d 333, 337 (Mo. App. 1983). Moreover, plaintiff has cited no cases nor has our research disclosed any that hold or

teach the questioning of a city employee by a city's personnel director violates the employee's First Amendment rights. A decision to dismiss the employee may be coercive and, thus, violate the employee's First Amendment rights. **See, Rankin v. McPherson,** 483 U.S. 378, 97 L.Ed.2d 315, 107 S.Ct. 2891. But, the mere posing of questions, as was done here, cannot reasonably be deemed coercion.

No one disputes the City may place reasonable restrictions on the political conduct of its employees. **E.g. Pollard v. Bd. of Police Comm'rs.,** 665 S.W.2d 333, 339 (Mo. banc 1984), **cert. denied,** 473 U.S. 907, 105 S.Ct. 3534, 87 L.Ed.2d 657 (1985). Whether plaintiff's "speech" here was protected by the First Amendment is determined by balancing his interests, "as a citizen, in commenting upon matters of public concern and the interests of the [City], as an employer, in promoting the efficiency of the public services it performs through its employees." **See, e.g., Pickering v. Board of Education,** 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968). But, where this balancing test is required, the employee's "right can rarely be considered 'clearly established' at least in the absence of closely corresponding factual and legal precedent." **Warner v. Graham,** 845 F.2d 179, 183 (8th Cir. 1988). Understandably, then, on the present record, Duffe's conduct, objectively, was reasonable. "Qualified immunity would be meaningless if it could be defeated merely by the recitation of some well-recognized right and a conclusory allegation that the defendant infringed it." **Warner, supra** at 183.

Judgment affirmed.

. . . . . .

HAROLD L. SATZ, JUDGE

Smith, P.J., and Stephan, J., concur.

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(St. Louis City)

DONALD G. BLACKWELL,

Plaintiff,

v.

CITY OF ST. LOUIS and WILLIAM DUFFE,

Defendant.

Cause No. 854-00083
August 30, 1988
Division No. 2

JUDGMENT ON COUNT III OF PLAINTIFF'S SECOND AMENDED PETITION

Plaintiff's Motion for Summary Judgment against defendant City of St. Louis on Count III of his Second Amended Petition previously heard and submitted. Defendants City of St. Louis and William Duffe's Joint Motions for Summary Judgment on Count III of Plaintiff's Seconded Amended Petition previously heard and submitted.

Based upon the pleadings and record contained in the Court's file, the Court finds there is no genuine issue as to any material fact and that Defendants City of St. Louis and William Duffe are each entitled to a judgment as a matter of law on their respective Motions for Summary Judgment, based upon the following:

1. Section 19 of Article XVIII of the City Charter has specifically been held to be constitutional by the Missouri Supreme Court en banc. **State ex Inf. McKittrick, ex rel. Ham v. Kirby, et al.,** 163 S.W.2d 990. (1942)

2. The Missouri Court of Appeals, in affirming the trial court's decision on Count I in this case specifically found

the language of Section 19 to be "plain and unambiguous." Further, the Court's decision was based upon factual grounds and not upon legal grounds. There was no finding by the Court that the Defendants acted improperly only that the record did "not contain substantial evidence that" Plaintiff violated the City Charter.

3. The City policy, as embodied in Section 19 of Article XVIII of the City Charter and Rule XV Section 2b of Civil Service, if enforced properly at it was here (even tho later reversed on factual grounds) dos not amount to a violation of Plaintiff's constitutional rights of free speech, free assembly and freedom to petition. Therefore, Defendant City is not liable under 42 U.S.C. §1983. (**City of St. Louis v. Praprotnik,** 56 L.W. 4201 (U.S. 1988)).

4. Defendant Duffe acted properly pursuant to Section 5 of Civil Service Rule XV and pursuant to his duties as Director of Personnel. These acts are officially protected acts under 42 U.S.C. §1983, and were not unconstitutional, as applied at the time. (**Anderson v. Creighton,** 97 L.E.2d 523.)

By reason of the above, Plaintiff's Motion for Summary Judgment is moot.

Costs on Count III, if any, taxed against Plaintiff.

For purposes of appeal, this order is a final judgment.

SO ORDERED:

. . . . . .

Robert G. Dowd, Jr.
Circuit Judge

cc: Attorney Diekemper
Attorney Bush

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION FOUR

DONALD G. BLACKWELL, Respondent, v. CITY OF ST. LOUIS, et al., Appellants.	NO. 50961 Appeal from the Circuit Court of the City of St. Louis Hon. Thomas M. O'Shea, Judge OPINION FILED: Feb. 3, 1987

This appeal follows a judgment of the Circuit Court reversing an order of the Civil Service Commission of the City of St. Louis ("Commission") which suspended Donald G. Blackwell for 28 days without pay. The Commission held that Blackwell acted in a manner that violated prohibitions in the City's Charter against political activity. We affirm the Circuit Court's decision.

Our review is limited to whether the Commission's findings are supported by competent and substantial evidence based on the whole record. **Crafton v. State Bd. of Chiropractic Examiners,** 693 S.W.2d 320, 321 (Mo. App., E.D. 1985). The reviewing court may not substitute its judgment for that of the Commission and must view the evidence in the light most favorable to that decision. **Stovall v. Civil Service Comm'n,** 636 S.W.2d 364, 366 (Mo. App., E.D. 1982).

At the time the charges were brought against him, Blackwell had been a fire fighter for thirty years and had an unblemished record. He held the position of Battalion Chief

and also served as President of Local 73 of the St. Louis Fire Fighters, IAF, AFL-CIO ("Local 73"). The charge filed against him alleged that he violated certain provisions of the Charter of the City of St. Louis ("Charter") and the Civil Service Rules ("Rules"). It was alleged that Blackwell had engaged in the type of political activity proscribed for public employees in his position. The charge arose following two local newspaper stories which quoted Blackwell, as Union President, in reference to James Shrewsbury, a St. Louis City Alderman, and Shrewsbury's role in the rejected proposal to increase the St. Louis Fire Fighters Pension Fund.

At the evidentiary hearing before the Commission, it was established that Blackwell had attended the October 5, 1984 Board of Aldermen's meeting at which the Fire Fighters Pension proposal was rejected. He attended in his capacity as Union President and wore civilian clothes. Following the vote on the proposal, he was approached by five or six members of the news media and interviewed for his reaction to the vote. Thereafter, the **St. Louis Post-Dispatch** and the **South Side Journal** each published one article on the subject.

In the **Post-Dispatch** article, which appeared one day after the interview, Blackwell was quoted as saying, "I'm sure the Fire Fighters will be acting in preventing his [Shrewsbury's] election." The **South Side Journal** article appeared five days after the interview and it quoted Blackwell as stating that the Union would "be active in preventing his [Shrewsbury's] re-election." Both articles identified Blackwell only as President of the Fire Fighters Union.

The Commission found Blackwell in violation of Section 19 of Amended Article XVIII of the Charter of the City of St. Louis and Rule XV, Section 2(b) of the Civil Service

Rules.[1/] Specifically, it concluded that he used his official authority or influence to coerce political action. It stated that, "[t]he public threat against Alderman Shrewsbury that the St. Louis Fire Fighters would work to prevent the re-election of Alderman Shrewsbury is such conduct and speech by a Battalion Chief in the Fire and Fire Prevention Division which is prohibited by the Charter." On appeal, the Circuit Court reversed the Commission's order.

The Commission raises two related points on appeal. Both points question the lower court's ruling that the Commission's order was not supported by competent and substantial evidence.

1/The charter provision and civil service rule provide in identical language as follows:

> No person holding a position in the classified service shall use his official authority or influence to coerce the political action of any person or body, or to interfere with any election, or shall take an active part in a political campaign, or shall seek or accept nomination, election, or appointment as an officer of a political club or organization, or serve as a member of a committee of any such club or organization, or circulate or seek signatures to any petition provided for by any primary or election law, or act as a worker at the polls, or distribute badges, color, or indicia favoring or opposing a candidate for election or nomination to a public office, whether federal, state, county, or municipal. But nothing in this section shall be construed to prohibit or prevent any such person from becoming or continuing to be a member of a political club or organization or from attendance upon political meetings, from enjoying entire freedom from all interference in casting his vote, from expressing privately his opinions on all political questions, or from seeking or accepting election or appointment to public office, provided, however, that no active campaign for election shall be conducted by any employee unless he shall first resign from his position.

In its first point, the Commission claims that Blackwell's acts following the Board of Aldermen's meeting constituted a use of his official authority and influence to coerce the political activity of subordinate firefighters, other public officials, and the Board of Aldermen. Such coercion is prohibited conduct under the Charter and Rules. The Commission characterized Blackwell's statement, as reported in the press, as a "threat" which it then found to be synonymous with "coerce."

However, BLACK'S LAW DICTIONARY 234 (rev. 5th ed. 1979) defines coerce as "[c]ompelled to compliance; constrained to obedience, or submission in a vigorous or forcible manner." The prohibited conduct, according to the plain and unambiguous language of the Charter and Rule, is the use of "official authority or influence to coerce the political action of any person or body . . ." The Commission did not charge Blackwell with actual coercion, intimidation, or pressure of anyone. There is no evidence that Blackwell actually coerced, intimidated, or pressured anyone. Moreover, the record is devoid of evidence to show that Blackwell's official capacity placed him in a position to actually coerce others, by means of discharge, discipline, demotion, transfer or reassignment. The fact that Blackwell held an official position within the Fire Department is not, in itself, sufficient to find coercion. Neither the Charter nor the Rules prohibit the **possibility** of coercion, only the actual exercise of the same.

Further, Blackwell's role at the Board of Aldermen's meeting was well-delineated by the fact that he was there as President of Local 73 to lobby for the increase to the Pension Fund. The reporters testified that they approached him because he was the Union President and identified him as such in their articles. Absent some evidence that Blackwell used his authority or influence as Battalion Chief to

coerce someone to political activity, the Commission's finding is unsupported by competent and substantial evidence. This point is denied.

The Commission's second point alleges that there was competent and substantial evidence to find that Blackwell engaged in proscribed political activity by "interfering with an election and taking an active part in a political campaign by his threats and action at an impromptu press conference." Initially, we note that the Commission did not rely on these proscribed activities in reaching its decision. Even if the Commission had used these provisions to find fault, its decision would not be supported by competent and substantial evidence.

The Charter and Rules proscribe "active" participation in political activity. It is beyond debate that federal, state and local governments may place some restrictions on the political conduct of public employees. **Pollard v. Bd. of Police Comm'rs,** 665 S.W.2d 333, 339 (Mo. banc 1984), **cert. denied** . . U.S. . . , 105 S.Ct. 3534, 87 L.Ed.2d 657 (1985). "The goal is to balance the interest of the employee as a citizen, in exercising first amendment rights, and the interest of the government, as an employer, in promoting the efficiency and impartiality of public services." **Pollard,** 665 S.W.2d at 339; **Ferguson Police Officers Ass'n v. City of Ferguson,** 670 S.W.2d 921, 928 (Mo. App., E.D. 1984).

The record does not contain substantial evidence that Blackwell either coerced others to political activity or actively engaged in political activity. Where an administrative body's finding is not based on substantial evidence, it is arbitrary and capricious, and cannot stand. **Edmonds v. McNeal,** 596 S.W.2d 403, 407 (Mo. banc 1980). This point is denied.

Finally, Blackwell filed a motion to dismiss, which was taken with the case, based on the contention that the judgment of the Circuit Court is not appealable, since judgment

has not been rendered on his other three counts. The trial court made no order that the judgment was either final or interlocutory. We turn to Rule 81.06, V.A.M.R.,[2/] to determine the answer. It is true that Count I is related to the other counts in that they all stem from Blackwell's response to the press following the aldermanic meeting of October 5, 1984. However, Count I is a petition to review the Commission's administrative decision. The remaining counts are: a declaratory judgment asking that the prohibitions be declared unconstitutional; an action for damages and injunctive relief based on alleged deprivation of federally protected rights; and an action for damages and injunctive relief based on the allegation of unlawful discrimination for participation in labor organization activities. Since the issue in Count I is entirely different from those in the remaining counts, the disposition of Counts II, III, and IV is not dependent on the determination of the petition for review. We conclude that the judgment on Count I was a final judgment for purposes of appeal. The motion is denied. **See Crenshaw v. Great Central Ins. Co.,** 527 S.W.2d 1, 3 (Mo. App., E.D. 1975); **Hauser v. Hill,** 510 S.W.2d 765, 766 (Mo. App., E.D. 1974).

2/Rule 81.06 reads in pertinent part: "When a separate trial is had before the court without a jury of claims arising out of the same transactions, occurrences or subject matter as the other claims stated or joined in the case the judgment entered shall not be deemed a final judgment for purposes of appeal within the meaning of Section 512.020, RSMo, unless specifically so designated by the court in the judgment entered. However, when a separate trial is had before the court without a jury of an entirely separate and independent claim unrelated to any other claims stated or joined in the case, then the judgment entered shall be deemed a final judgment for purposes of appeal within the meaning of Section 512.020, RSMo, unless the court orders it entered as an interlocutory judgment to be held in abeyance until other claims, counterclaims, or third-party claims are determined."

The judgment of the trial court is affirmed.[3/]

. . . . . .

GARY M. GAERTNER,
Presiding Judge

Stephan, J., Simon, J., concur

3/The City of St. Louis joined the Commission in this appeal. It raised two points, the first of which alleged that there was substantial evidence to support the Commission's findings. See text above for our disposition of this point. Its second point claims that the Commission erroneously disregarded its rules by imposing a 28-day suspension when the rules require dismissal for the type of violation charged against Blackwell. Having found that Blackwell did not violate the Charter or Rules, we need not address this issue. **But see Stovall v. Civil Service Comm'n,** 636 S.W.2d 364, 367-68 (Mo. App., E.D. 1982) (the Commission may modify a disciplinary action so long as the modification falls within the list of available alternatives under the Rules).

IN THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

DONALD G. BLACKWELL, Plaintiff, vs. THE CITY OF ST. LOUIS, et al: Defendants.	Cause Nos. 854-00083 854-00086 (consolidated) Division No. 3

ORDER

Count I of Cause 854-00083 is a proceeding for review pursuant to Chapter 536, Missouri Revised Statutes of Missouri, of a decision of The Civil Service Commission of the City of St. Louis, dated March 11, 1985. Count I has been briefed, fully argued and was taken under submission by this Court for ruling.

Court now takes up Count I of Cause 854-00083 and upon a careful consideration and review of the entire record before The Civil Service Commission of the City of St. Louis, this Court finds and determines that the findings and decision of said Commission are unsupported by competent and substantial evidence upon the whole record.

THEREFORE, it is the ORDER and JUDGMENT of this Court that the decision of The Civil Service Commission of the City of St. Louis, dated March 11, 1985, be and is hereby **REVERSED.**

So ordered this 8th day of November, 1985.

THOMAS M. O'SHEA
Judge, Div. #3

cc: Jerome A. Diekemper, Esq.
Julian L. Bush, Esq.
Julius H. Berg, Esq.
Cause #854-00086

BEFORE THE CIVIL SERVICE COMMISSION
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

In the Matter of)
DON G. BLACKWELL.)

DECISION

This is the matter of the hearing before the Civil Service Commission regarding alleged political activity by Mr. Don G. Blackwell, Battalion Fire Chief, Fire and Fire Prevention Division, Department of Public Safety.

At the hearing before the Civil Service Commission on February 4, 1985, in Room 239 Municipal Courts Building, St. Louis, Missouri, Mr. Blackwell appeared in person and was represented by Mr. Jerome A. Diekemper, Attorney at Law. Mr. William C. Duffe, Director of Personnel, appeared in person and was represented by Mr. John J. Fitzgibbon, Associate City Counselor. Testimony and evidence were presented, the hearing concluded, and the matter taken under advisement by the Civil Service Commission for its decision.

The Civil Service Commission, having heard and considered all testimony and evidence submitted, and being fully advised in the premises, makes and enters the following findings of fact, conclusions of law and decision.

FINDINGS OF FACT

I.

Don G. Blackwell was employed at all times described herein as a Battalion Fire Chief, Fire and Fire Prevention Division, Department of Public Safety.

II.

The position of Battalion Fire Chief is a competitive position in the classified service of the City of St. Louis.

III.

Chief Blackwell, when interviewed by the press at the conclusion of a session of the St. Louis Board of Aldermen, stated that St. Louis Fire Fighters would work to prevent the re-election of Alderman James Shrewsbury. Such statement was widely publicized in two St. Louis newspapers.

IV.

Alderman Shrewsbury was a leading opponent of a bill in the Board of Aldermen which would have increased Fire Fighters' pensions.

V.

Section 19 of Amended Article XVIII of the City Charter and Rule XV, Section 2(b), of the Civil Service Rules provide:

> "No person holding a position in the classified service shall use his official authority or influence to coerce the political action of any person or body, or to interfere with any election, or shall take an active part in a political campaign, or shall seek or accept nomination, election, or appointment as an officer of a political club or organization, or serve as a member of a committee of any such club or organization, or circulate or seek signatures to any petition provided for by any primary or election law, or act as a worker at the polls, or distribute badges, color, or indicia favoring or opposing a candidate for election or nomination to a public office, whether federal, state, county, or municipal. But nothing in this section shall be construed to prohibit or prevent any such person from becoming or continuing to be a member of a political club or organization or from attendance upon political meetings, from enjoying entire freedom from all interference in casting his vote, from expressing privately his opinions on all political questions, or from seeking

or accepting election or appointment to public office, provided, however, that no active campaign for election shall be conducted by any employee unless he shall first resign from his position."

VI.

Chief Blackwell's statement constituted a threat of active political opposition by Fire Fighters during Alderman Shrewsbury's re-election campaign. Chief Blackwell was in a position, by virtue of his office, to influence or coerce subordinate Fire Fighters to further political acts in violation of the foregoing.

VII.

Further, said threats could be construed as a warning to other public officials of possible political retribution by Fire Fighters should said officials take a position contrary to the desires of the Fire Fighters.

VIII.

Further, said threats, if allowed to go undisciplined, would be interpreted as permissible, along with other prohibited acts which would be necessary to carry out such threats.

IX.

Chief Blackwell did not attempt to mitigate his threat by apology or offer to make a public retraction.

X.

In consideration of all the above, Chief Blackwell's threat constituted a violation of Section 19 of Amended Article XVIII of the City Charter and Rule XV, Section 2(b), of the Civil Service Rules.

XI.

Chief Blackwell's violation of the prohibition against political activity by a person in a competitive position in the classified service is a serious offense and warrants the imposition of a 28 calendar day suspension without pay.

CONCLUSIONS OF LAW

Section 19 of Amended Article XVIII of the City Charter, cited in the foregoing Findings of Fact, allows entire freedom for persons in the classified service from interference in expressing privately their opinions on all political questions. However, the clear words of the Charter prohibit using a person's official authority or influence to coerce the political action of any person or body. The public threat against Alderman Shrewsbury that the St. Louis Fire Fighters would work to prevent the re-election of Alderman Shrewsbury is such conduct and speech by a Battalion Chief in the Fire and Fire Prevention Division which is prohibited by the Charter. Further, it is a threat to others who are legislators that retribution should be taken against those who take a position contrary to the desires of the Fire Fighters.

The Civil Service Commission concludes that Don G. Blackwell violated the provisions of Section 19 of Amended Article XVIIII and Rule XV, Section 2(b), of the Civil Service Rules. Section 5 of Rule XV of the Civil Service Rules sets forth the penalty to be imposed upon an individual found guilty of violation of the prohibition against political activity:

"Section 5. VIOLATIONS; PENALTIES:

> In every case where it shall come to the attention of the Director that any employee in the classified service, subject to Article XVIII and these rules, has engaged in political or other activities forbidden under these rules and Article XVIII, he shall conduct an investigation and upon the completion of the same present his findings to the Commission at its next regular meeting thereafter. The Commission, following a review of the findings, may conduct a complete investigation and hearing; if the Commission finds that the employee has

been guilty of a violation of the act and these rules, it shall order immediate dismissal of the employee and shall instruct the Director to so inform the Comptroller."

Although the foregoing Section provides for immediate dismissal of an employee found by the Commission to have violated the prohibition against political activity, the Civil Service Commission deems, in view of Chief Blackwell's past personnel record, the penalty of dismissal from the City Service would be excessive. The Commission, therefore, orders a penalty of a twenty-eight (28) calendar day suspension without pay.

THEREFORE, it is the decision of the Civil Service Commission that Don G. Blackwell be suspended from the position of Battalion Fire Chief, Fire and Fire Prevention Division, Department of Public Safety, for a period of 28 calendar days, with the dates of said suspension to be determined by the Fire Chief.

The above and foregoing decision was adopted on motion duly made and seconded, and carried by a majority vote of 2-1 of the Civil Service Commission at the special meeting of the Civil Service Commission on March 11, 1985.

By direction of the
CIVIL SERVICE COMMISSION

.....

William C. Duffe
Secretary

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TO: ATTORNEY OF RECORD

FROM: DEIRDRE O. AHR, CLERK

PAGE: 1 OF 1

DATE: SEPTEMBER 13, 1989

RE: MOTIONS FOR REHEARING AND/OR TRANSFER TO SUPREME COURT DENIED

1. 54587 — STATE OF MISSOURI, RESP.
   VS. SIMPSON, DONELL, APP.

2. 54735 — TITSWORTH, LOIS, APP.
   VS. POWELL, LARRY AND WILLIMENUE, RESP.

3. 55071 — COOPER, PATRICIA MICHELLE, RESP.
   VS. COOPER, WAYNE, APP.

4. 55566 — KOMOSA, JOHN, APP.
   VS. KOMOSA, MARCIA D., RESP.

5. 55583 — STATE OF MISSOURI, RESP.
   VS. FITZGERALD, LAURA, APP.

6. 55600 — BLACKWELL, DONALD G., APP.
   VS. CITY OF ST. LOUIS AND DUFFE, WILLIAM, RESP.

7. 55866 — HOGAN, LARRY C., APP.
   VS. STATE OF MISSOURI, RESP.

8. 55893 — BLAINE, DENORVAL MAURICE, APP.
   VS. STATE OF MISSOURI, RESP.

IN THE SUPREME COURT OF MISSOURI

No. 72093

E.D. No. 55600

Donald G. Blackwell,		Steptember Session, 1989
vs. (TRANSFER)		Plaintiff-Appellant,
City of St. Louis and William Duffe,		Defendants-Respondents.

Now at this day, on consideration of Plaintiff-Appellant's Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.
STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1989, and on the 14th day of November 1989, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 14th day of November 1989.

.....
Thomas Simon, Clerk

.....
Kathleen Blanton, D.C.

POSITION STATEMENT OF DON BLACKWELL REGARDING ALLEGED VIOLATIONS OF ARTICLE XVIII SECTION 19 OF THE CITY CHARTER AND RULE XV SECTION 5 OF THE CIVIL SERVICE RULES

1. The statements which Mr. Blackwell is alleged to have made do not violate either the letter or the spirit of the City Charter or the Civil Service Rules.

Article XVIII, Section 19 of the City Charter and Rule XV, Section 5 of the Civil Service Rules state, in identical language:

> No person holding a position in the classified service shall use his official authority to influence or coerce the political action of any person or body, or to interfere with an election, or shall take an active part in a political campaign. . .

On behalf of Mr. Blackwell we assert that the statements he is alleged to have made amount, at most, to expressions of his own personal displeasure with and opposition to Alderman Shrewsbury and his opinion or prediction that individual fire fighters may oppose Alderman Shrewsbury's re-election in the future. Mr. Blackwell maintains that any comments that he made were made as an individual and as a representative of the Fire Fighter's Union but were not made in connection with his employment by the City of St. Louis or on behalf of his employer. The alleged statements do not constitute a "use of official authority or influence" by Mr. Blackwell and do not indicate any attempt to "coerce political action", to "interfere with any election" or to "take an active part in a political campaign." In fact, there is no election pending in which Mr. Blackwell can be said to be interfering and there is no political campaign underway in which Mr. Blackwell can be said to be taking an active part.

The City of St. Louis Fire Department has published guidelines interpreting the City Charter and Civil Service Rules as they relate to department members. In Section 4.02 the guidelines state:

> No member shall use the uniform, badge, prestige, or good name of the department, to attempt to influence the vote of any person or persons for or against any candidate for office.

Mr. Blackwell's alleged statements do not violate even the slightly more specific language of this provision. Mr. Blackwell did not invoke the uniform, badge, prestige or good name of the fire department, he did not attempt to influence the vote of anyone, and finally there is no "candidate for office" involved or affected by the alleged comments.

In conclusion, Mr. Blackwell asserts that his alleged comments do not violate the City Charter, the Civil Service Rules, or even the City of St. Louis Fire Department's guidelines and no disciplinary action against him can be justified based upon the alleged comments.

II. **Disciplinary action for a violation of the City Charter provision and Civil Service Rule based on the alleged comments would violate the constitutional rights of Mr. Blackwell.**

Mr. Blackwell, although a civil service employee, is also a citizen who has constitutionally protected rights to comment on matters of public concern. Mr. Blackwell also holds the position of President of the Fire Fighter's Union and is protected by Missouri law from discharge or discrimination for exercising his collective bargaining rights.

We assert that the provisions of the City Charter and Civil Service Rule are unconstitutionally vague in that men

of common intelligence must guess at their meaning, employees of the City of St. Louis are given inadequate warning of what activities are proscribed, and the provisions fail to set out explicit standards for the persons who must apply them.

We assert that the City Charter and Civil Service Rules are unconstitutionally overbroad in that the provisions are not narrowly tailored to regulate the particular modes of expression which must be regulated in order to protect the City's legitimate interests. The provisions are overbroad as applied to Mr. Blackwell's alleged comments in that the alleged comments do not fall squarely within the hard core of the proscriptions of the provisions.

Finally, we assert that Mr. Blackwell's comments were "pure speech" upon matters of public concern and are entitled to the greatest constitutional protection under the First Amendment. Disciplinary action against him for such comments cannot be justified by the limited interests of the City in regulating the "political activity" of Civil Service employees.

Mr. Blackwell submits that any disciplinary action against him in connection with the alleged comments would violate his First Amendment rights to freedom of speech.

Respectfully submitted,

DIEKEMPER, HAMMOND AND SHINNERS
7730 Carondelet, Suite 222
St. Louis, Missouri 63105
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JEROME A. DIEKEMPER
Attorneys for Don Blackwell

CITY EXHIBIT 1

Article from **St. Louis Post-Dispatch** of October 6, 1984

FIREFIGHTERS UNION TO PUT HEAT ON ALDERMAN JAMES SHREWSBURY

By Gregory B. Freeman
Of the Post-Dispatch Staff

The head of the city firefighters union says Alderman James F. Shrewsbury, D-16th Ward, will be targeted for defeat by the union for Shrewsbury's part in helping defeat a measure that would have increased the pensions of retired firefighters.

The Board of Aldermen deferred on Friday a move to override a veto of the bill by Mayor Vincent C. Schoemehl Jr. Schoemehl vetoed the measure last month, saying it was too costly. The mayor estimated that the increased benefits would cost the city $551,000 a year for the next 30 years.

The measure would have allowed pensions for firefighters to be based on their salaries during the last year before retirement instead of their last three years. Schoemehl said the bill would have set a benefit precedent that the police and other city employees would have "most surely pursued" despite even greater costs.

Aldermanic President Thomas E. Zych had hoped for an override of the veto, but was never able to muster the 20 votes needed. Friday was the last opportunity Zych had to override the veto.

Donald G. Blackwell, president of Local 73 of the International Association of Firefighters, said he was disappointed that the aldermen had been unable to override the veto — "especially because we made a number of concessions on the bill."

Blackwell said Shrewsbury had been one of the leading opponents of the bill.

"I'm sure the firefighters will be acting in preventing his re-election," Blackwell said. "His opposition to the bill was adamant, and he brought up many things that weren't even related to the bill. There were other aldermen who opposed our bill, but they didn't criticize our efforts."

Shrewsbury will be up for re-election in 1987.

Last month, Schoemehl asked aldermen to wait three or four months before acting on the bill. He said a special committee's review of the city's retirement plans should be completed first.

When the aldermen approved the bill anyway, the mayor vetoed it.

In other action, the Board of Aldermen Friday gave first-round approval to a measure requiring dog owners to clean up after their pets. The measure is based on New York City's "pooper scooper" bill. Violators of the measure could be fined up to $500 and serve as much as 30 days in jail. The bill, sponsored by Aldermen Martie J. Aboussie, D-9th Ward, and Nellene Joyce, D-22nd Ward, will be up for final consideration next week.

CITY EXHIBIT 2

Article from **Southside Journal** of October 10, 1984

FIREFIGHTERS UNION TARGETS SHREWSBURY OVER PENSION ISSUE

By Gail Compton
Journal Staff Writer

Alderman James Shrewsbury, D-16th Ward, looks at his role on the Board of Aldermen as "keeping bad things from happening."

And he believes his opposition to a firefighters' pension bill reflects that role.

"Sometimes it is more important to stop bad legislation than introduce a lot of bills," he said. "But I am not an obstructionist."

City firefighters disagree with Shrewsbury's stance, and the head of their union said they will target the alderman for defeat when he seeks re-election.

The bill would allow firefighters to base their pensions on their last year of work, rather than the last three years.

Mayor Vincent C. Schoemehl Jr. vetoed it, saying the bill would cost the city $551,000 a year over the next 30 years. The mayor also claimed it would set a precedent for future action by police and city employee pension boards.

FRIDAY WAS the last chance for aldermanic President Thomas E. Zych to obtain an override vote on the Board of Aldermen. But he could not gather the necessary 20 votes.

So Zych deferred action on the veto over the objections of Shrewsbury, who tried to be recognized to ask for a clarification of the rules. Zych ignored him.

"I wanted a clarification from the chair," Shrewsbury said. "I was blatantly and totally ignored. Any alderman deserves recognition. I just wanted to know if the bill would be brought up again. I didn't want to embarrass them or show they didn't have the votes."

Donald G. Blackwell, president of Local 73 of the International Association of Firefighters, said the issue was not dead. "We will definitely try again next spring," he said after the meeting.

Blackwell said he was disappointed that the measure was vetoed by the mayor because "we have made a lot of concessions on the bill."

IN RETURN FOR basing the pension on the last year of service, the firefighters accepted a limit of 25 percent on the cost-of-living increase, Blackwell said. That lid means the bill would cost the city only about $25,000 a year, he said.

Blackwell pointed to Shrewsbury as a leading opponent of the measure and said the union would "be active in preventing his re-election.

"His opposition to the bill was adamant, and he brought up things that weren't even related to the bill," Blackwell said. "There were other aldermen that were opposed to the bill, but they didn't criticize our efforts."

Blackwell said he especially was angered by Shrewsbury's attempt Friday to be recognized.

"We wanted the bill to just die a peaceful death and not put the aldermen on the spot in a roll call vote. Why make an alderman go on the record when it is obvious we don't have the votes? Shrewsbury tried to force a roll call, and that just wasn't necessary."

BUT SHREWSBURY said he did not want a roll call, just a clarification of the rules and assurance from Zych that the veto override would not come up again.

"I wasn't even going to speak on a motion to override the veto," the alderman said. "I had already said everything I wanted to against the bill."

Shrewsbury suggested that the firefighters look to their own union leaders when they are assessing blame for the bill's fate.

"Firefighters can blame me for stopping the bill if they want to," he said. "But they probably should look at their own union leadership. They are the ones that couldn't get the job done. They couldn't convince two-thirds of the board of aldermen that it was a good idea.

"The firefighters' union doesn't want me to do a careful study of the issues — compare the pension systems or engage in a debate on the issues. They want me to take orders from them and vote the way they want. I don't think the people of the 16th Ward want that," he said.

Shrewsbury said he does not have enough influence with other aldermen to kill a bill alone.

"THE ONLY influence I have is what I say on the floor (of the board of aldermen), I don't make deals, and I don't control any jobs or grants."

The prospect of facing opposition from the firefighters in a re-election bid in 1987 does not frighten him, Shrewsbury said.

"I have no problems with the firefighters. They didn't support me (when he was elected in 1983); in fact, they worked for my opponent.

"I believe the people of the 16th Ward want an independent alderman who is not beholden to special interest groups and will do what's right for both the city and the neighborhood," Shrewsbury said.

He said his voting record has been consistent with what he believes is best for his constituents, who he says pay more taxes than those in any other area of the city.

"I TRY TO stay consistent, but I am not rigid. I am not conservative, just cautious. But I always ask how much will it cost and who will pay for it," he said.

"I voted against pay hikes for the county officeholders and patronage employees and to abolish the Crime Commission. I was against giving Eugene Slay leases on the riverfront and against the bill to pay back retired firefighters the money they paid into their pension system.

"All were popular issues, and it was not easy to vote against them. But I have to keep asking myself 'who will pay?' and I know the people from my ward and the city just can't afford it."

Shrewsbury said the bill would cost the city money and not benefit anyone but the firefighters.

"How could the firefighters' bill, if passed, benefit the citizens of St. Louis? Would they (firefighters) work more hours, put out more fires or cause our insurance to decrease?"

CITY EXHIBIT 3

TESTIMONY OF DON BLACKWELL REGARDING INVESTIGATION OF POLITICAL ACTIVITY

PRESENT: Mr. William C. Duffe,
Director of Personnel;

Mr. Floyd Kimbrough,
Administrative Assistant;

Mr. John Fitzgibbon,
Associate City Counselor;

Chief Don Blackwell,
Battalion Fire Chief; and

Mr. Jerome Diekemper,
Attorney for Chief Blackwell.

DATE: December 13, 1984

MR. DUFFE: This is a record of part of an investigation made by myself, William C. Duffe, Director of Personnel for the City of St. Louis, concerning political activity by Fire Fighters of the City of St. Louis. The investigation is pursuant to Article XVIII, Section 25, of the Charter of the City of St. Louis. I have before me today Battalion Chief Don Blackwell. Chief, we have probable cause to believe that you have been engaged in political activity because of articles appearing in the St. Louis Post-Dispatch and Southside Journal. I also want to ask you questions concerning possible political activities by Fire Fighters of the City of St. Louis.

CHIEF BLACKWELL: Excuse me, Mr. Duffe. I received this registered letter, and I also received a letter at my place of employment, subpoenaing me here for this hearing. But nowhere in these subpoenas did it tell me what the investigation was about. And I had no official notice of what I was going to be interrogated about. So, I really don't know if I can be prepared to answer these questions without

prior notice. I really never realized that someone could be subpoenaed without any notification of what they're being subpoenaed for.

MR. DIEKEMPER: Are you asking for a continuance?

CHIEF BLACKWELL: No. I'm just going on record.

MR. DUFFE: Well, Chief, if you do not know the answers to any of these questions, you merely may say that you don't know.

CHIEF BLACKWELL: And just on the record again, Mr. Duffe, with due respect to your position and the other gentlemen, my work schedule is available to everyone. I am curious as to why I was subpoenaed on my day off instead of on a workday. I had to give up my own time and drive in from my place in the country.

MR. DUFFE: Chief, I apologize for any inconvenience. If I can proceed, I'm going to read Civil Service Rule XV, Section 2, paragraph (b). It says:

> "No person in a competitive position in the classified service shall use his or her official authority or influence to coerce the political action of any person or body, or to interfere with any election, or shall take an active part in a political campaign, or shall seek or accept nomination, election, or appointment as an officer of a political club or organization, or serve as a member of a committee of any such club or organization, or circulate or seek signatures to any petition provided for by any primary or election law, or act as a worker at the polls, or distribute badges, color or indicia favoring or opposing a candidate for election or nomination to a public office whether federal, state, county, or municipal. But nothing in this subsection shall be construed to prohibit or prevent any such person from becoming or continuing to be a member of a political club or organization or from attendance

upon political meetings, from enjoying entire freedom from all interference in casting his or her opinions on all political questions, or from seeking or accepting election or appointment to public office, provided, however, that no active campaign for election shall be conducted by any employee unless he or she shall first resign from his or her position."

At this time, Chief, I'm going to place you under oath pursuant to my investigative powers under the City Charter. If you'll please raise your right hand.

(Oath administered)

CHIEF BLACKWELL: Mr. Duffe, another question. This investigation, was it brought about by your department, or was there outside complaints?

MR. DUFFE: People did bring to my attention several articles that appeared in daily or weekly newspapers published in the City.

CHIEF BLACKWELL: Is this based on a premise of quotes in a newspaper? They're about as right as weather predictions. They interview for 15 minutes and put 2 lines in there.

MR. DUFFE: Chief, I deal with the press as you do. I do not take anything published in any newspaper at face value. I'm only here to ask you questions about things you allegedly said. If you deny saying them or you say you said something different or were quoted out of context, I mean that's what I'm here to establish. People have made complaints to me that these things appeared saying you said these things. And I'm only here to investigate the situation.

Q (By Mr. Duffe) Just for the record, could I ask you to state your name?

A Don G. Blackwell.

Q And what is your position?

A I'm a Battalion Fire Chief in the St. Louis Fire Department, 30 years 5 months of service.

Q Thank you. Chief —

A (Interrupting) Eligible for maximum pension.

Q Thank you. Chief, let me give you an article that I am told appeared in the St. Louis Post-Dispatch. It has a by-line of Gregory B. Freeman of the Post-Dispatch staff. And I want you to look this over. I'm going to ask you some questions about it.

(Document handed to Chief Blackwell)

Q Chief, this article has a headline — Fire Fighters Union To Put Heat On Alderman James Shrewsbury.

A Yes. It's not very accurate, though, not true. Alderman Shrewsbury is still an alderman. He's not even up for election for 3 years.

Q I know that. Chief, it says in here that you said:

> "I'm sure the Fire Fighters will be acting in preventing his election."

In the context of the article it was referring to Alderman Shrewsbury. It goes further on to say:

> "His opposition to the bill was adamant. He brought up many things that weren't even related to the bill. There were other aldermen that were opposed to our bill, but they didn't criticize our efforts."

Do you recall making that statement?

A I do not recall making those statements. At that time I was interviewed by about 5 or 6 different news media people at once. And they were all asking questions. Any reference there I was referring to the Fire Fighter as a personal individual that lived in the 16th Ward. There are a

lot of Fire Fighters live in the 16th Ward, and I doubt if any of them will vote for Mr. Shrewsbury. That's their own prerogative, not mine. I live in the 16th Ward, and I will not vote for him. But I don't call that political activity.

Q Do you recall making threats that the Fire Fighters would be working against Alderman Shrewsbury in the coming election to any reporters?

A At this time I can't recall making them.

Q Do you recall specifically any reporters that you made any statements to?

A I remember Freeman was there, and that other gal from the Southside Journal, the young fellow from the Globe, Kathy McDonald, Mike Owens. I can remember at least those people.

Q Do you recall if Mr. Freeman made any notes?

A They were all making notes.

Q Do you recall threatening Alderman Shrewsbury —

A (Interrupting) No.

Q — in any of your statements? Chief, I'm going to hand you another article which I'm told appeared in the Southside Journal. It has a by-line by a Gail Compton, who is described as a Journal staff writer. I'll show it to you.

(Document handed to Chief Blackwell)

Q This article has a headline that says — Fire Fighters Union Targets Shrewsbury Over Pension Issue. Chief, this article says that, and I quote from the article:

> "Blackwell pointed to Shrewsbury as leading opponent of the measure and said the Union would be 'active in preventing his reelection.' "

It goes on to quote:

"His opposition to the bill was adamant and he brought up things that weren't even related to the bill."

Further —

A (Interrupting) That, he did.

Q It further goes on to quote you saying:

"There were other aldermen that were opposed to the bill, but they didn't criticize our efforts."

And it goes on to say:

"Blackwell said he especially was angered by Shrewsbury's attempt Friday to be recognized. 'We wanted the bill to just die a peaceful death and not put the aldermen on the spot in a roll call vote. Why make an alderman go on the record when it is obvious we don't have the votes. Shrewsbury tried to force a roll call and that just wasn't necessary.' "

A I think that was the proper action and request by the sponsors of the bill — Tom Zych and Geraldine Osborn. Mr. Shrewsbury wanted to make an issue of it. But we had no control over that. We can't control the actions of the Board of Aldermen.

Q Well, I'm not so concerned about your lobbying for a bill. I —

A (Interrupting) We are a duly recognized —

Q — think that's your right. I'm more concerned with the quote that says, or the part of the quote that says that the union will "be active in preventing his reelection." That part of the quote is what I'm concerned about. I wonder whether you made that statement.

A I think I already answered that.

Q To the reporter Gail Compton. Pardon me?

A I think I already answered that.

Q To the reporter Gail Compton. I asked you if you made it to Greg.

A I think I said they were all there at once, and they were all taking notes at once, they were all asking questions at once.

Q So, your answer is you don't recall.

A I do not recall it.

Q Do you recall making any statement to this reporter. Gail Compton, that the Fire Fighters Union was going to take retribution against James Shrewsbury in the form of working against his reelection when his term is up?

A I don't recall it in that firm line. We are a recognized labor organization. We do have an authorized, certified PAC Committee. And I would assume that the PAC Committee would support his opponent, which is legal.

Q I'm not asking what a PAC Committee might do. I don't know whether you have a PAC Committee or not. But I'm not going to ask whether you have one or whether the PAC Committee is going to operate towards any end. I'm asking whether you made any statements that any Fire Fighters are going to personally be active against the reelection of James Shrewsbury.

A We are well aware, Mr. Duffe, that it is against the law for us to work actively in political candidate campaigns. And I would not condone or encourage any of our members to do that.

Q Thank you.

A In all the quotes, all the speeches, anything else, never have I used my official position as a Battalion Fire Chief to influence, but speaking as a president of a union elected by 760 men to represent them and speak their wishes. So, if I'm guilty, then 760 men are guilty.

Q I'm only asking, Chief, whether you were threatening James Shrewsbury with the personal political actions of some odd Fire Fighters to work personally against his reelection in a manner —

A (Interrupting) No, I would never put my members in a position to be possibly terminated to work against him.

Q Thank you. I'm going to ask you some other questions relating to political activity by Fire Fighters generally. Some of them are prompted by hearsay remarks or complaints that have come to my attention, others —

A (Interrupting) Do we get an opportunity to cross-examine these people that are making these complaints?

Q Well, this is an investigation. This is not a trial. This is not a hearing. We are only taking your testimony under oath as to what you know about these things. If there is any further proceeding of the nature of a hearing or a trial, you certainly will be, you know, if any of those people are summoned as witnesses.

MR. DIEKEMPER: Can we go off the record for a second.

(Whereupon, a short discussion was had off the record, and the proceeding resumed as follows:)

Q (By Mr. Duffe) Chief, do you have knowledge of a post-election party at Fire Fighters Hall, that's the hall at 5866 Christy, if I've used the wrong name, in behalf of Senator Jim Murphy on the night of November 6, 1984?

A The hall is for rent to anybody that wants to rent it. Mr. Murphy rented the hall and paid for the hall.

Q So, there was a post-election party there the night of November 6, 1984.

A There was a party there.

Q And it was —

A (Interrupting) I believe it was a combination of people. It was not just Mr. Murphy. I can't really answer that because, there again, as President of the Union I have no, I don't manage or control the hall. The Relief Association owns and controls the hall. And they have professional managers whose job it is to rent the hall as often as possible.

Q So, you as President of the Union do not have control of the hall.

A No.

Q And as far as you know, the hall was rented by Senator Jim Murphy.

A I believe it was rented by the 12th Ward Organization and some others. It was a mutual, like a contribution type of thing. Elected Representative Gail Chatfield was part of the — In other words, they booked the hall as a group, and that way defrayed the cost. That's what I was told. You'll have to check with the hall management to find out for sure. We just rent there. We pay rent.

Q To the Firemen's Relief Association.

A We pay $300 a month rent for office space. I think it's $300, since I'm under oath. I don't make out the checks.

Q Well, I won't quibble with the amount anyway since it's not directly germane to the investigation. Do you have any knowledge of any Fire Fighters working at the polls in behalf of any candidates at any polling places on November 6, 1984?

A No.

Q Do you specifically — This is a bit redundant. But do you specifically have any knowledge of a Eugene Poole, a Fire Fighter, working at any polling place in behalf of any candidate on November 6, 1984?

A Do I have that knowledge?

Q Yes.

A After the fact I have the knowledge. But I did not have the knowledge that day. But I've got to be honest with you. We had some people working. We bought and had printed up literature and material supporting Amendments 1 and 3, which dealt with public employees in the State of Missouri. And we were under the premise set by precedents in the past that we were allowed to work for non-candidate issues. And Gene was apparently doing this on his own. And we found out that there were others that did it on their own. We had flyers printed up. They were available. We mailed out flyers. And if Gene was working, that's what he was working for in my opinion.

Q I'm not asking you whether you or any other Fire Fighters or the Union had printed up or did anything else in behalf of any issues involved in the November 6 election.

A The Union's position and my position as President for the last 10 years is that we are not allowed to work for political candidates. We are allowed to work for amendments, propositions. And we have told our people not to work for candidates. Now, what they do as an individual, we can't control.

Q Thank you. Do you, Chief, have any knowledge of any Fire Fighters canvassing, passing out campaign literature, or posting campaign posters or other material for any candidate prior to the election on November 6, 1984?

A There again, only for Amendments 1 and 3.

Q I'm not asking about issues. I'm asking about candidates for election as individuals to public office.

A No.

Q Do you have any knowledge of any Fire Fighters operating from phone banks in behalf of any candidate prior to the election on November 6, 1984?

A Do I have any knowledge?

Q Yes.

A No.

MR. DUFFE: This concludes my questions. Do you have any questions of me or the investigation? Or do you wish to say anything for the record?

MR. DIEKEMPER: Well, on behalf of Chief Blackwell, for his own personal information as the head of Local 73, we would like a clarification of whether the City or you, as the Director of Personnel and the Civil Service Commission, would consider it to be a violation of Rule XV for a union officer to state what might happen 3 years from now because the Rule seems to me to be directed specifically to activities, rather than statements about what activities may be 3 years down the road. So that he can, you know, guide his future conduct accordingly, we would request a clarification to at least what your position is on that issue.

MR. DUFFE: Well, let me speak somewhat hypothetically.

CHIEF BLACKWELL: I don't consider this hypothetical. I got a subpoena.

MR. DUFFE: Let me speak hypothetically because I don't want to make the statement on the record that I think you made a political threat against Alderman Shrewsbury. I think that depends upon, you know, what you said here today and what the newspapers said and what the reporters might be willing to back up. But I would see threatening an elected official with political activity that is prohibited by the Charter as a political act that's proscribed by the Charter and the Rules. Am I clear?

MR. DIEKEMPER: I think I understand what you're saying.

MR. DUFFE: Chief, I have no further questions. I appreciate your appearance here this morning, and I appreciate your remarks.

CHIEF BLACKWELL: I would like to ask a couple questions, probably what Jerry already said. The articles in the paper there quote me as President of Local 73, President of the Fire Fighters. They don't say Battalion Chief anywhere, I don't believe. I'd like to know for the future as the president of an authorized union, bargaining agent for the Fire Fighters of the City of St. Louis, where I stand when it comes to making statements regarding my union, regarding my dual role as an employee of the City of St. Louis. Are union leaders given any consideration as an exception?

MR. DUFFE: Well, Chief, let me answer that on the record as Director of Personnel. I cannot speak for the Civil Service Commission. I cannot speak for the Law Department. I feel that as long as you are a City employee that you are bound by the Charter. And I don't think the position as union president gives you liberty to violate the Charter or the Rules with respect to political activity. Now, you mention a Political Action Committee, or something of that nature. I'm not a lawyer. Unless someone advises me otherwise, I feel that you all can form PACS, you can hire spokesmen who are not City employees who can make statements that might be contra to Article XVIII of the Charter in respect to political activity and also Rule XV of the Civil Service Rules. On the other hand, I don't think that any Fire Fighter can do something because he's a member of a PAC or because he's directed by some business agent of a union, who may not be a City employee, to do anything in violation. Obviously, I wouldn't have the last word on that. But I'll tell you what my thinking is now

and how my future actions will be guided as Director of Personnel, unless someone can advise me otherwise in a confident way.

CHIEF BLACKWELL: In other words, that's your position.

MR. DUFFE: That's my position.

CHIEF BLACKWELL: That sort of leaves me up in the air.

MR. DUFFE: Well, Chief, I don't know whether this should be on the record, but I wouldn't say that your role is necessarily unambiguous. We have (inaudible) law on collective bargaining in the State of Missouri. We have some law on political activity in the City of St. Louis. And neither is the last word on any of these stuff. I just gave you the best advice I could give you.

This completes this phase of the investigation of Chief Blackwell and any others who might be subpoenaed or otherwise investigated with regard to political activity by Fire Fighters.

DEFENDANTS' ANSWER TO INTERROGATORY 21

21. State how, when, and in what manner, Plaintiff's alleged violations of the City Charter and the Civil Service Commission Rule came to the attention of the Department of Personnel of the City of St. Louis and attach any written notice or complaint thereof.

ANSWER: Not applicable to Defendants City of St. Louis, Duffe and Nash. Defendant Duffe states that he was advised of newspaper articles concerning violations by several people whom the Director does not now remember. In addition, the Director of Public Safety, Thomas Nash, wrote a letter to the Civil Service Commission bringing the matter to the Commission's attention. A copy of said letter is attached hereto, incorporated herein by reference and designated Exhibit B.

Respectfully submitted,

DIEKEMPER, HAMMOND AND SHINNERS
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JEROME A. DIEKEMPER #28641

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LESLIE V. FREEMAN #31346

OFFICE OF THE DIRECTOR
DEPARTMENT OF PUBLIC SAFETY
401 CITY HALL
CITY OF SAINT LOUIS
MISSOURI 63103

Vincent C. Schoemehl, Jr.
Mayor

Thomas R. Nash
Director

October 16, 1984

Honorable William C. Duffe
Director of Personnel
Room 235, Municipal Courts Bldg.

Dear Mr. Duffe:

Recently I have read in more than one newspaper that the St. Louis City firefighters are going "to be active in preventing the re-election" of Alderman Jim Shrewsbury of the 16th Ward.

This comment was made by a firefighter who is currently president of firefighters Local 73. This firefighter also is a City employee holding a job with a Civil Service classification as all City firefighters do.

I think it is common knowledge that some Civil Service employees, and firefighters in particular, have actively participated in the campaign of individuals seeking election to public office in the City of St. Louis.

It is my understanding the Civil Service rules strictly prohibit such partisan activity on the part of City employees with Civil Service classifications.

In light of the blatant and public threat of political annihilation of an elected City Official by a City employee whose job is protected by Civil Service rules, I respectfully

request the Civil Service Commission to convene at its earliest convenience to clarify the rule in this regard.

Yours truly,

Thomas R. Nash
Director

TRN/af

March 1985

NEWSGRAM
Department of Personnel
235 Municipal Courts Bldg.
Saint Louis, Mo. 63103

POLITICAL THREAT GETS BATT. CHIEF 28-DAY SUSPENSION

The Civil Service Commission has ordered a 28-day suspension for a Fire Dept. Battalion Chief because of political activity in violation of the City Charter and the Civil Service Rules. In charges brought to the Commission, the Department of Personnel accused the Firefighter of public statements that members of the Fire Department would work for the defeat of 16th Ward Alderman James Shrewsbury. Such statements, which were published in local newspapers, constitute political activity that is forbidden to Civil Service employees, the Commission found.

Personnel Director **William C. Duffe** noted that his department would continue to enforce the prohibition on political activity by Civil Service workers. He added that political activity could lead to pressures on Civil Service employees from many kinds of political candidate.

On that same subject, Duffe noted that financial contributions to a political candidate are also against the City Charter for Civil Service employees. "The protection is placed in the Charter so Civil Service employees cannot by 'lugged' or assessed part of their salary to keep their jobs, as happens in some jurisdictions." He indicated that this also applies to campaign fund-raisers.

In a final point, Duffe emphasized that Tuesday, April 2, is a normal workday for all City offices, and it **not** a holiday for Civil Service workers.

DEFENDANTS' ANSWER TO INTERROGATORY 9

9. Set forth each and every interest of purpose served by or intended to be served by the publishing and distribution of the article regarding Plaintiff's suspension which appeared in the Department of Personnel Newsgram attached to Plaintiff's Petition as Exhibit E.

ANSWER: To point out to City employees, through the **Newsgram,** that the Department of Personnel and Civil Service Commission are prepared to take serious steps against those who violate their responsibilities as set out in the Charter and Rules and that they are not going to continue to issue mere warnings on the subject.

STATE OF MISSOURI)
CITY OF ST. LOUIS) SS.

IN THE CIRCUIT COURT OF THE
CITY OF ST. LOUIS
STATE OF MISSOURI

DONALD G. BLACKWELL, Plaintiff, vs. CITY OF ST. LOUIS, et al. Defendants.	Cause No. 854-00083 Division No. 2 Administrative Review, Etc.

PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS DIRECTED TO DEFENDANTS

Comes now Plaintiff, Donald G. Blackwell, and pursuant to Rule 59.01 of the Missouri Rules of Civil Procedure requests that Defendants admit the genuineness of the documents described herein and exhibited with this request and the truth of the matters of fact set forth herein. Defendants are requested to file written answers in the time allowed under this Rule and to specifically admit or specifically deny each matter herein.

1. Plaintiff is, and at all times mentioned in his Petition, was a resident of the City of St. Louis, State of Missouri.

2. Plaintiff is, and at all times mentioned in his Petition, was an employee of the City of St. Louis, holding a position in the classified service as Battalion Fire Chief, Fire and Fire Prevention Division, Department of Public Safety.

3. Plaintiff is, and at all times mentioned in his Petition, was the President of the St. Louis Fire Fighters Association Local No. 73.

4. The Civil Service Commission of the City of St. Louis is an administrative body existing under the Charter of the City of St. Louis and the laws of the State of Missouri.

5. The Civil Service Commission of the City of St. Louis is authorized by law to make rules and adjudicate contested cases.

6. The Civil Service Commission of the City of St. Louis is authorized to hold hearings on matters involving the discipline and dismissal of classified employees.

7. At all times mentioned in Plaintiff's Petition Defendant Cyrus S. Keller was the Chairman of the Civil Service Commission of the City of St. Louis.

8. At all times mentioned in Plaintiff's Petition Defendant Neil M. Bischoff was the Vice-Chairman of the Civil Service Commission of the City of St. Louis.

9. At all times mentioned in Plaintiff's Petition Defendant James P. Schmid was a member of the Civil Service Commission of the City of St. Louis.

10. At all times mentioned in Plaintiff's Petition Defendant Thomas R. Nash was the Director of Public Safety of the City of St. Louis.

11. Defendant City of St. Louis is a municipality, existing pursuant to the laws of the State of Missouri and to the Charter of the City of St. Louis.

12. At all times mentioned in Plaintiff's Petition Defendant William C. Duffe was the Director of Personnel of the City of St. Louis and the Secretary of the Civil Service Commission of the City of St. Louis.

13. The acts and practices alleged in Plaintiff's Petition occurred within the City of St. Louis, State of Missouri.

14. On October 5, 1984 the St. Louis Board of Aldermen met and voted on a proposal to override Mayor Vincent C. Schoemehl, Jr.'s veto of a measure that would have increased the pension of retired Fire Fighters.

15. Plaintiff attended the October 5, 1984 session of the St. Louis Board of Aldermen.

16. Plaintiff was present at the October 5, 1984 session of the Board of Aldermen in his capacity as President of the St. Louis Fire Fighters Association, Local No. 73, AFL-CIO.

17. Exhibit A, attached hereto is the Certification of Representative issued to the St. Louis Fire Fighters Association, Local No. 73, AFL-CIO by the State Board of Mediation, dated September 28, 1977.

18. On October 5, 1984 Plaintiff was questioned by reporters after the session of the Board of Aldermen.

19. Exhibit B attached hereto is a copy of an article which appeared in the St. Louis Post-Dispatch in October of 1984.

20. Exhibit C attached hereto is a copy of an article which appeared in the South Side Journal Newspaper in October of 1984.

21. On or about December 1, 1984 Defendant Nash filed a written complaint with the Department of Personnel of the City of St. Louis alleging that political threats were made by Plaintiff against Alderman James Shrewsbury.

22. On or about October 16, 1984 Defendant Duffe initiated an investigation of the complaint against Plaintiff filed by Defendant Nash.

23. On or about December 1, 1984 Plaintiff was served with a subpoena to appear before the Department of Personnel to testify in connection with an investigation.

24. On or about December 13, 1984 Plaintiff appeared before the Department of Personnel and responded to questions posed by William C. Duffe, Director of Personnel.

25. Exhibit D attached hereto is a transcript of questions posed to Plaintiff and the answers given by Plaintiff in said proceedings on December 13, 1984.

26. On or about January 28, 1985 Plaintiff was served with Notice that a hearing would be held before the Civil Service Commission of the City of St. Louis.

27. Exhibit E, attached hereto, is a copy of the Notice served on Plaintiff on January 28, 1985.

28. On or about February 4, 1985 a hearing was held before the Civil Service Commission in connection with charges against Plaintiff.

29. On February 4, 1984 Plaintiff, by his counsel Jerome A. Diekemper, filed a position statement with the Civil Service Commission and provided copies of said position statement to counsel for Defendant City.

30. Exhibit F attached hereto is a copy of the position statement filed by Plaintiff with the Civil Service Commission and provided to Defendant City.

31. On or about February 18, 1985 the Commission notified Plaintiff of its conclusion that Plaintiff had violated Article XVIII of the City Charter and Rule XV, Section 2(b) of the Civil Service Rules, that Plaintiff would be suspended for 28 days without pay, and that Findings of Fact, Conclusions of Law and the formal decision of the Commission would be forthcoming.

32. On March 1, 1985 Plaintiff was suspended without pay through and including March 28, 1985.

33. On March 12, 1985 the Commission mailed its final decision, Findings of Fact, and Conclusion of Law herein to Plaintiff and to the City of St. Louis.

34. On or about March 1, 1985 Defendant Duffe published and distributed a Department of Personnel Newsgram, which included an article about Plaintiff's suspension.

35. Exhibit G attached hereto is a copy of the March, 1985 Department of Personnel Newsgram.

36. Section 19, Article XVIII of the Charter of the City of St. Louis is a Rule within the meaning of Section 536.010.4 and Section 536.050 R.S.Mo.

37. Rule XV, Section 2(b) of the Civil Service Rules of the City of St. Louis is a Rule within the meaning of Section 536.010.4 and Section 536.050 R.S.Mo.

38. At all times mentioned in Plaintiff's Petition Defendants Keller, Bischoff, Schmid, Nash, Duffe and Defendant City acted under color of the Statutes, ordinances, regulations, custom and usage of the State of Missouri and its subdivision, the City of St. Louis.

39. At all times mentioned in Plaintiff's Petition Defendants Keller, Bischoff, Schmid, Nash, Duffe and Defendant City acted pursuant to and in implementation of the official policies, ordinances, and regulations adopted and promulgated by the Defendant City of St. Louis.

40. The St. Louis Fire Fighters Association, Local No. 73, AFL-CIO, is the exclusive bargaining representative within the meaning of Section 105.500.2 R.S.Mo. of Fire Department employees.

41. The St. Louis Board of Aldermen is a public body within the meaning of Section 105.500.3 R.S.Mo.

42. Defendants Keller, Bischoff, Schmid, Nash, Duffe and Defendant City of St. Louis owed duties to Plaintiff pursuant to Section 105.510 to:

a. refrain from discrimination against Plaintiff because of his exercise of his rights under that Statute;

b. refrain from compelling or attempting to compel Plaintiff or other public employees to refrain from joining a labor organization, directly or indirectly, by intimidation or coercion.

Respectfully submitted,

DIEKEMPER, HAMMOND AND SHINNERS
7730 Carondelet, Suite 222
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(314) 727-1015

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JEROME A. DIEKEMPER
#28641

. . . . . .

LESLIE V. FREEMAN
#31346
Attorneys for Plaintiff

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

DONALD G. BLACKWELL,
Plaintiff,
vs.
CITY OF ST. LOUIS, et al.,
Defendants.

Cause No. 854-00083
Division No. 2

RESPONSE OF DEFENDANTS CITY OF ST. LOUIS, WILLIAM C. DUFFE AND THOMAS R. NASH TO PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS DIRECTED TO DEFENDANTS

Come now Defendants City of St. Louis, Duffe and Nash and for their answers to Plaintiff's First Request for Admissions state:

1. Defendants admit the allegations set forth in Paragraphs 1, 2, 4, 7, 8, 9, 10, 12, 14, 17, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35.

2. With regard to Paragraph 3 of Plaintiff's First Request for Admission, Defendants have insufficient knowledge to form a belief in the truth thereof, and therefore, deny same.

3. With regard to Paragraph 5 of Plaintiff's First Request for Admissions, Defendants state that the powers and duties of the Civil Service Commission of the City of St. Louis are set forth in Article XVIII of the Charter of the City of St. Louis.

4. With regard to Request No. 6, Defendants admit that the Civil Service Commission of the City of St. Louis is authorized by law to make certain rules and adjudicate

certain contested matters; however, it is not authorized to hold hearings on matters involving the discipline and dismissal of all classified employees.

5. With regard to Paragraph 11, Defendants state that Defendant City of St. Louis is a municipality, existing pursuant to the laws of the State of Missouri and governed, **inter alia** by the provisions of the Charter of the City of St. Louis.

6. With regard to Paragraph 13, Defendants admit that those "action" which Defendants have admitted in their answer to Plaintiff's Complaint took place within the City of St. Louis. Defendants object to the remainder of said Paragraph 13 for the reason that it is vague and unclear, and Defendants are, therefore, unable to respond with the necessary precision.

7. With regard to Paragraph 15, Defendants have insufficient knowledge to form a belief as to the truth of the allegations set forth therein and, therefore, deny same.

8. Defendants deny the allegations set forth in Paragraph 16.

9. With regard to Paragraph 18, Defendants have insufficient knowledge to form a belief as to the truth of the allegations set forth therein and, therefore, deny same.

10. With regard to Paragraph 22, Defendants admit that the referenced letter from Defendant Nash to Defendant Duffe was one of the factors that prompted Defendant Duffe to commence the investigation in question.

11. With regard to Paragraphs 36 and 37, Defendants object to same inasmuch as said requests call for legal conclusions and invade the province of the Court.

12. With regard to Paragraph 38, Defendants admit that, at all times, Defendants City of St. Louis, Duffe and Nash acted pursuant to all pertinent statutes, Charter pro-

visions, ordinances, rules and regulations. Defendants deny the remainder of the allegations set forth in said Paragraph 39.

13. With regard to Paragraph 40, Defendants admit that St. Louis Firefighters Association, Local No. 73, AFL-CIO is an exclusive bargaining unit in the manner set forth in Exhibit A to Plaintiff's Petition for Review. Defendants object to the remainder of Paragraph 40, inasmuch as it calls for a legal conclusion and invades the province of the court.

14. With regard to Paragraphs 41 and 42(a) and 42(b), Defendants object to same inasmuch as said requests call for legal conclusions and invade the province of the court.

JAMES J. WILSON,
CITY COUNSELOR
#18356

.....

Judith A. Ronzio
Associate City Counselor
Attorney for Defendants
314 City Hall
St. Louis, MO 63103
622-4694

Copy of the foregoing mailed
this 15th day of July, 1985 to:
Jerome Diekemper, Attorney for Plaintiff
7730 Carondelet, Suite 222
Clayton, MO 63105
and
Julius Berg
7777 Bonhomme
Clayton, MO 63105

STATE OF MISSOURI)
) SS.
CITY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE
CITY OF ST. LOUIS
STATE OF MISSOURI

DONALD G. BLACKWELL,

Plaintiff,

vs.

CITY OF ST. LOUIS,
Serve:
MAYOR VINCENT C.
SCHOEMEHL,
City Hall
St. Louis, Missouri 63103,

CIVIL SERVICE COMMISSION
OF THE CITY OF ST. LOUIS,
Serve:
WILLIAM C. DUFFE, Secretary
235 Municipal Courts Building
St. Louis, Missouri 63103,

CYRUS S. KELLER, Chairman
of the Civil Service Commission
235 Municipal Courts Building
St. Louis, Missouri 63103,

NEIL M. BISCHOFF,
Vice-Chairman of the Civil
Service Commission
235 Municipal Courts Building
St. Louis, Missouri 63103,

JAMES P. SCHMID, Member
of the Civil Service Commission
235 Municipal Courts Building
St. Louis, Missouri 63103,

Cause No. . . . . .

Division No. . . . . .

Administrative
Review, Etc.

THOMAS R. NASH, Director of Public Safety of the City of St. Louis
City Hall
St. Louis, Missouri 63103,

WILLIAM C. DUFFE, Director of Personnel of the City of St. Louis
235 Municipal Courts Building
St. Louis, Missouri 63103,

Defendants.

Comes now Plaintiff, Donald G. Blackwell, and alleges the following facts to be included and incorporated in each of his four counts below:

Parties

1. Plaintiff, is, and at all times mentioned herein, has been, a citizen of the United States, a resident of the City of St. Louis, State of Missouri, an employee of the City of St. Louis, holding a position in the classified service as Battalion Fire Chief, Fire and Fire Prevention Division, Department of Public Safety and the President of the St. Louis Fire Fighters Association Local No. 73, a labor organization, existing pursuant to the laws of the State of Missouri.

2. The Defendant Civil Service Commission of the City of St. Louis, hereafter called "Commission", is an administrative body existing under the Charter of the City of St. Louis and the laws of the State of Missouri and is authorized by law to make rules and to adjudicate contested cases. The Commission is authorized to hold hearings on matters involving the discipline and the dismissal of classified employees.

3. At all times relevant hereto, Defendant Cyrus S. Keller was the Chairman of the Civil Service Commission. Defendant Keller is sued in both his individual and official capacities.

4. At all times relevant hereto, Defendant Niel N. Bischoff was the Vice Chairman of the Civil Service Commission. Defendant Bischoff is sued in both his individual and official capacities.

5. At all times relevant hereto, Defendant James P. Schmid was a member of the Civil Service Commission. Defendant Schmid is joined as a necessary party although Plaintiff seeks no relief from him, either individually or in his official capacity.

6. At all times relevant hereto, Defendant Thomas R. Nash was the Director of Public Safety of the City of St. Louis. Defendant Nash is sued in both his individual and official capacities.

7. Defendant City of St. Louis is a municipality, existing pursuant to the laws of the State of Missouri and to the Charter of the City of St. Louis.

8. At all times relevant hereto, Defendant William C. Duffe, was the Director of Personnel of the City of St. Louis. Mr. Duffe is sued in both his individual and official capacities.

Facts

9. The unlawful acts and practices alleged herein were committed within the City of St. Louis, State of Missouri.

10. Plaintiff, on October 5, 1984 attended a session of the St. Louis Board of Aldermen and was interviewed thereafter by certain members of the press.

11. Plaintiff was present at the Board of Aldermen meeting in his capacity as president of St. Louis Fire Fighters Association, Local No. 73, AFL-CIO, the certified repre-

sentative of certain Fire Department employees. Exhibit A attached hereto is the Certification of Representative issued by the State Board of Mediation, dated September 28, 1977.

12. In response to reporters' questions on October 5, 1985, Plaintiff made certain statements.

13. The St. Louis Post-Dispatch and the South Side Journal newspapers published articles in which Plaintiff was allegedly quoted and in which Plaintiff's comments were discussed.

14. On or about October 16, 1984, Defendant Nash filed a complaint with the Department of Personnel of the City of St. Louis alleging that political threats were made by Plaintiff against Alderman James Shrewsbury. Defendant Nash knew or should have known that Plaintiff's statements were constitutionally protected.

15. Thereafter, on or about December 1, 1984, Plaintiff was served with a Subpoena to appear before the Department of Personnel to testify in connection with an investigation.

16. On or about December 13, 1984, Plaintiff appeared before the Department of Personnel and responded to questions posed by William C. Duffe, Director of Personnel.

17. On or about January 28, 1985 Plaintiff was served with Notice that a hearing would be held before the Commission in connection with "alleged political threats made by [Plaintiff] against Alderman James Shrewsbury."

18. On or about February 4, 1984 a hearing was held before the Commission, after which the matter was taken under advisement by the Commission.

19. On or about February 18, 1985 the Commission notified Plaintiff that it had concluded Plaintiff violated Article XVIII of the City Charter (attached hereto as Exhibit B) and Rule XV, Section 2(b) of the Civil Service

Rules (attached hereto as Exhibit C), that Plaintiff would be suspended for twenty-eight Law and the formal decision of the Commission would be forthcoming.

20. On March 1, 1985, Plaintiff was suspended without pay through and including March 28, 1985.

21. On March 12, 1985 the Commission mailed its final decision, Findings of Fact and Conclusions of Law herein, (attached hereto as Exhibit D). Plaintiff received said final decision on March 13, 1985.

22. On or about March 1, 1985, the Department of Personnel of the Defendant City of St. Louis, through Defendant Duffe, published and distributed a Department of Personnel Newsgram, including an article about Plaintiff's suspension (attached hereto as Exhibit E).

COUNT I

PETITION TO REVIEW DECISION OF THE CIVIL SERVICE COMMISSION OF THE CITY OF ST. LOUIS

Comes now the Plaintiff, Donald G. Blackwell, and for his Petition to Review the Order and Decision of the Civil Service Commission of the City of St. Louis, states as follows:

23. Jurisdiction of this Court over Count I is invoked pursuant to Section 536.010 R.S.Mo.

24. At all times relevant hereto Plaintiff has been subject to the restrictions of Section 19 Article XVIII of the Charter of the City of St. Louis and Rules XV, Section 2(b) of the Civil Service Rules and to the jurisdiction of Defendant Commission.

25. The action of the Commission herein is in violation of the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Missouri Constitution in that:

a. Plaintiff was denied his right to notice of what specific actions were forbidden or commanded by Section 19 of Article XVIII of the City Charter and Rule XV, Section 2(b) of the Civil Service Rules which are vague, indefinite, uncertain and insufficient to provide notice pursuant to due process.

b. Plaintiff was denied his right to freedom of speech involving matters of public concern, freedom of association, and freedom to petition the city government for redress of grievances by the unduly restrictive provisions of Section 19 Article XVIII of the City Charter and Rule XV Section 2(b) of the Civil Service Rules which are not justified by any compelling interest of the City of St. Louis.

c. Plaintiff was denied his right to a fair trial because the Commission's rulings on evidentiary and procedural matters were improper and manifestly unjust; the Commission admitted certain evidence which was improper and inflammatory; the effect of the Commission's rulings and admission of said evidence was to deny Plaintiff his rights to due process and a fair trial.

d. Plaintiff was denied his right to an impartial tribunal because the Commission demonstrated on the record a fundamental misunderstanding of the issues before it, a profound personal bias on the issues before it, and an inability to give the Plaintiff a fair hearing.

26. The decision of the Commission is in excess of its statutory authority or jurisdiction.

27. The purported Findings of Fact Nos. III, VI, VII, VIII, IX, X and XI are not supported by competent and substantial evidence upon the entire record but only by evidence which was improper, constituted hearsay, was without proper foundation, was speculative, conjectural, and inconclusive.

28. The purported Conclusions of Law are improper, erroneous, and not supported by competent and substantial evidence upon the whole record or by appropriate Findings of Fact but only by evidence which was improper, constituted hearsay, was without proper foundation, was speculative, conjectural, and inconclusive.

29. The Decision and the Order of the Commission are not authorized by law because said decision and order violate the First and Fourteenth Amendments to the United States Constitution, Article 1, Section 10 of the Missouri Constitution and constitute discrimination against Plaintiff because of his exercise of the rights guaranteed him by Section 105.510 R.S.Mo.

30. The Decision and Order of the Commission were made upon unlawful procedure and without a fair trial.

31. The Decision and Order of the Commission are arbitrary, capricious and unreasonable.

32. The Decision and Order of the Commission constitute an abuse of discretion.

33. For all of the above stated reasons, and each of them, Plaintiff states that judgment reversing the Commission's decision and order is amply warranted pursuant to Section 536.140 R.S.Mo. (1978).

34. Plaintiff is entitled to a reasonable allowance for attorney's fees in connection with this action.

WHEREFORE, Plaintiff prays that this Court review the entire record of this proceeding and make its own Conclusions of Law to the effect:

a. That the Decision and Order of the Commission are in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Missouri Constitution;

b. That Section 19 of Article XVIII of the City Charter and Rule XV Section 2(b) of the Civil Service Rules are void for vagueness in violation of the Fifth and Fourteenth Amendments to the United States Constitution; and Article 1, Section 10 of the Missouri Constitution;

c. That the Decision and Order of the Commission are in excess of statutory authority or jurisdiction;

d. That the Decision and Order of the Commission are not supported by competent and substantial evidence upon the whole record;

e. That the Decision and Order of the Commission are not authorized by law;

f. That the Decision and Order of the Board were rendered upon unlawful procedure and without a fair trial;

g. That the Decision and Order of the Commission are arbitrary, capricious and unreasonable;

h. That the Decision and Order of the Commission involve an abuse of discretion;

enter judgment reversing the Decision of the Commission and dismissing the charges against Plaintiff, with prejudice; reinstate Plaintiff as Battalion Fire Chief, Fire and Fire Prevention Division, Department of Public Safety effective immediately with backpay and with restoration of all seniority and benefits of his position; strike all reference to this incident from Plaintiff's personnel file; allow Plaintiff reasonable attorney's fees and expenses herein; and grant such further and other relief as to the Court may seem just and proper in the circumstances.

COUNT II

DECLARATORY JUDGMENT

Comes now Plaintiff, Donald G. Blackwell, and for his cause of action pursuant to Section 536.050 R.S.Mo.

against Defendant Civil Service Commission and Defendant City of St. Louis states as follows:

35. Jurisdiction and venue of this Court are invoked pursuant to Section 536.050 R.S.Mo.

36. Section 19, Article XVIII of the Charter of the City of St. Louis and Rule XV, Section 2(b) of the Civil Service Rules of the City of St. Louis, are rules within the meaning of Section 536.010.4 and Section 536.050 R.S.Mo.

37. By decision and order dated March 12, 1985 (attached hereto as Exhibit D) the Civil Service Commission applied Article XVIII of the City Charter and Rule XV Section 2(b) of the Civil Service Rules to Plaintiff, concluded that Plaintiff had violated said Rules, and suspended Plaintiff for twenty-eight (28) days without pay.

38. Said Rules should be declared as invalid and unconstitutional in that:

a. The Rules are vague, indefinite, uncertain and insufficient to provide notice of what specific actions are forbidden or commanded pursuant to due process under the Fourteenth Amendment to the United States Constitution and under Article 1, Secion 10 of the Missouri Constitution.

b. Said Rules are unduly restrictive, are not justified by any compelling interest of the City of St. Louis and violate the rights of freedom of speech and freedom of association under the First Amendment to the United States Constitution.

c. Said rules infringe upon the rights of Plaintiff and other public employees guaranteed by Section 105.510 R.S.Mo.

39. Plaintiff has no complete or adequate remedy at law and is entitled to a declaratory judgment respecting the validity of said Rules as applied to Plaintiff and as may be

applied to Plaintiff and to similarly situated public employees in the future pursuant to Section 536.050 R.S.Mo.

WHEREFORE, Plaintiff prays for a declaratory judgment that Section 19 Article XVIII of the Charter of the City of St. Louis and Rule XV, Section 2(b) of the Civil Service Rules of the City of St. Louis are invalid and unconstitutional under the First and Fourteenth Amendments to the United States, under Article 1, Section 10 of the Missouri Constitution and pursuant to Section 105.510 R.S.Mo.; for an Order enjoining the application of said Rules to Plaintiff and to any and all classified employees of the City of St. Louis; and for such other and further relief as to this Court seems just and proper in the premises.

COUNT III

DEPRIVATION OF CIVIL RIGHTS

Comes now Plaintiff, Donald G. Blackwell, and for his cause of action pursuant to 42 U.S.C. Section 1983 against Defendants Cyrus S. Keller, Neil M. Bischoff, Thomas R. Nash, and William C. Duffe, personally and in their official capacities, and against Defendant City of St. Louis, states as follows:

40. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1343, 42 U.S.C. Section 1983, and 42 U.S.C. Section 1988.

41. The actions of Defendants Nash, Keller, Bischoff, Duffe and Defendant City were was taken under color of the statutes, ordinances, regulations, custom and usage of the State of Missouri and its subdivision, the City of St. Louis.

42. The actions of Defendants Nash, Keller, Bischoff, Duffe and Defendant City were taken pursuant to and in implementation of the official policies, ordinances and regulations adopted and promulgated by the Defendant City of St. Louis.

43. Defendant Nash, in filing the complaint which resulted in the investigation and disciplining of Plaintiff, acted to intentionally violate, interfere with, and chill the exercise of the rights of Plaintiff and other classified employees to freedom of speech, freedom of assembly and freedom to petition the City government for redress of grievances under the First Amendment to the United States Constitution.

44. Defendants City of St. Louis, Duffe, Nash, Keller, and Bischoff, in promulgating, maintaining and enforcing Section 19, Article XVIII of the Charter of the City of St. Louis and Rule XV, Section 2(b) of the Civil Service Rules against Plaintiff and other classified employees are intentionally violating, interfering with, and chilling the exercise of the rights of Plaintiff and other classified employees to freedom of speech, freedom of assembly and freedom to petition the City government for redress of grievances under the First Amendment to the United States Constitution.

45. Defendants City of St. Louis and Duffe in writing, publishing and distributing articles in the Department of Personnel Newsgram concerning enforcement and threatened enforcement of Section 19, Article XVIII of the Charter of the City of St. Louis and Rule XV Section 2(b) of the Civil Service Rules against Plaintiff and other classified employees, in March, 1985 (Exhibit E) and on previous occasions, acted to intentionally violate, interfere with, and chill the exercise of the rights of Plaintiff and other classified employees to freedom of speech, freedom of assembly and freedom to petition the City government for redress of grievances under the First Amendment to the United States Constitution.

46. The actions of Nash, Keller, Bischoff, Duffe and Defendant City were taken intentially in retaliation against Plaintiff for the exercise of his right to freedom of speech,

freedom of association and freedom to petition the City government for the redress of grievances protected by the First Amendment to the United States Constitution.

47. The actions of Defendants Nash, Keller, Bischoff and Defendant City were taken in bad faith, with knowledge that said actions infringed on Plaintiff's rights under federal and state law, and with intent, reckless indifference or callous indifference to Plaintiff's rights under federal and state law.

48. The actions of Defendants Nash, Keller, Bischoff, Duffe and Defendant City deprived Plaintiff of his right to freedom of speech to comment on matters of public concern, his right to freedom of association and his right to petition the City government for redress of grievances under the First Amendment to the United States Constitution without justification by any compelling interest of the City of St. Louis.

49. The actions of Defendants Nash, Keller, Bischoff, Duffe and Defendant City deprived Plaintiff of his right to due process of law under the Fourteenth Amendment to the United States Constitution.

50. As a result of the actions of Defendants Nash, Keller, Bischoff, Duffe and Defendant City Plaintiff has been stigmatized, has lost wages and benefits of employment, has suffered emotional distress, humiliation and embarrassment.

51. Plaintiff is entitled to recover his reasonable costs herein, including attorneys fees, pursuant to 42 U.S.C. Section 1988.

52. Plaintiff has no adequate or complete remedy at law.

WHEREFORE, Plaintiff prays that this Court enter judgment for the Plaintiff against Defendants Nash, Keller, Bischoff, Duffe, and the City of St. Louis, jointly and severally; order said Defendants to compensate Plaintiff for his

lost wages and benefits of employment, his emotional distress, humiliation and embarrassment in an amount to be proven at trial; enjoin the application of Section 19 Article XVIII of the Charter of the City of St. Louis and Rule XV, Section 2(b) of the Civil Service Rules of the City of St. Louis to Plaintiff and to any and all classified employees of the City of St. Louis; order said Defendants to pay to Plaintiff his reasonable attorney's fees and costs herein; order Defendants Keller, Bischoff, Nash, and the City of St. Louis to pay to Plaintiff actual damages in the amount of $25,000.00 and punitive damages in the amount of $100,000.00; and for such other and further relief as to this Court deems just and proper in the premises.

COUNT IV

DISCRIMINATION AGAINST PLAINTIFF FOR THE EXERCISE OF HIS RIGHTS TO JOIN A LABOR ORGANIZATION

Comes now Plaintiff, Donald G. Blackwell, and for his cause of action pursuant to Section 105.510 R.S.Mo. against Defendants Thomas R. Nash, Cyrus S. Keller, Neil M. Bischoff and William C. Duffe, personally and in their official capacities, and against Defendant City of St. Louis, states as follows:

53. The St. Louis Fire Fighters Association, Local No. 73, AFL-CIO (hereinafter the Fire Fighters Assn.) is the exclusive bargaining representative within the meaning of Section 105.500.2 R.S.Mo. of certain fire department employees.

54. The St. Louis Board of Aldermen is a public body within the meaning of Section 105.500.3.

55. On October 5, 1984 the St. Louis Board of Aldermen considered a proposal relative to salaries and other conditions of employment of public employees, including the fire department employees.

56. Plaintiff's attendance at the Board of Aldermen session and his comments made in connection therewith constituted an exercise of his rights and the rights of the Fire Fighters Assn. pursuant to Section 105.510 R.S.Mo.

57. Defendants Nash, Keller, Bischoff, Duffe and the Defendant City of St. Louis are subject to and governed by Section 105.510 R.S.Mo.

58. Defendants Nash, Keller, Bischoff, Duffe and the Defendant City of St. Louis owed duties to Plaintiff pursuant to Section 105.510 to:

a. refrain from discriminating against Plaintiff because of his exercise of his rights under that statute;

b. refrain from compelling or attempting to compel Plaintiff or other public employees to refrain from joining a labor organization, directly or indirectly, by intimidation or coercion.

59. Defendants Nash, Keller, Bischoff, Duffe and Defendant City violated the provisions of Section 105.510 and breached their duties to Plaintiff and other public employees by:

a. subjecting Plaintiff to investigation, charges, suspension and public ridicule because of the exercise of his rights under Section 105.510;

b. attempting to compel Plaintiff and other public employees to refrain from joining a labor organization, directly or indirectly, by intimidation or coercion.

60. As a direct and proximate result of the actions of Defendants Nash, Keller, Bischoff, Duffe and the Defendant City of St. Louis, Plaintiff has lost wages, has suffered emotional distress, humiliation and embarrassment.

61. Plaintiff has no adequate and complete remedy at law.

WHEREFORE, Plaintiff prays that this Court enter judgment for the Plaintiff against Defendants Nash, Keller, Bischoff, Duffe and the City of St. Louis, jointly and severally; find that said Defendants have violated the provisions of Section 105.510 R.S.Mo.; order said Defendants to compensate Plaintiff for his lost wages, emotional distress, humiliation and embarrassment in an amount to be proven at trial; order said Defendants to pay to Plaintiff his reasonable attorney's fees and costs herein; order said Defendants to pay to Plaintiff actual damages in the amount of $25,000.00 and punitive damages in the amount of $100,000.00; enjoin the application of Section 19 Article XVIII of the Charter of the City of St. Louis and Rule XV Section 2(b) of the Civil Service Rules of the City of St. Louis to Plaintiff and to any and all classified employees of the City of St. Louis; and for such other and further relief as to this Court seem just and proper in the premises.

DIEKEMPER, HAMMOND AND SHINNERS
7730 Carondelet, Suite 222
St. Louis, Missouri 63105
(314) 727-1015

. . . . . .
JEROME A. DIEKEMPER #21641

. . . . . .
LESLIE V. FREEMAN #31346
Attorneys for Plaintiff

STATE OF MISSOURI)
CITY OF ST. LOUIS) SS.

IN THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

DONALD G. BLACKWELL,
Plaintiff,
vs.
CITY OF ST. LOUIS, et al.,
Defendants.

Cause No. 854-00083
Division No. 2

SECOND AMENDED PETITION

Comes now Plaintiff, Donald G. Blackwell, and alleges the following facts to be included and incorporated in Counts I and III below:

1. Plaintiff was, and at all times mentioned herein, has been a citizen of the United States, a resident of the City of St. Louis, State of Missouri, an employee of the City of St. Louis, holding a position in the classified service as Battalion Fire Chief, Fire and Fire Prevention Division, Department of Public Safety and the President of the St. Louis Fire Fighters Association Local No. 73, a labor organization, existing pursuant to the laws of the State of Missouri.

2. The Defendant, Civil Service Commission of the City of St. Louis, hereafter called "Commission", is an administrative body existing under the Charter of the City of St. Louis and the laws of the State of Missouri and is authorized by law to make rules and to adjudicate contested cases. The Commission is authorized to hold hearings on matters involving the discipline and the dismissal of classified employees.

3. At all times relevant hereto, Defendant Cyrus S. Keller was the Chairman of the Civil Service Commission.

4. At all times relevant hereto, Defendant Neil N. Bischoff was the Vice Chairman of the Civil Service Commission.

5. At all times relevant hereto, Defendant James P. Schmid was a member of the Civil Service Commission.

6. At all times relevant hereto, Defendant Thomas R. Nash was the Director of Public Safety of the City of St. Louis.

7. Defendant City of St. Louis is a municipality, existing pursuant to the laws of the State of Missouri and to the Charter of the City of St. Louis.

8. At all times relevant hereto, Defendant William C. Duffe, was the Director of Personnel of the City of St. Louis. Mr. Duffe is sued in both his individual and official capacities.

9. The unlawful acts and practices alleged herein were committed within the City of St. Louis, State of Missouri.

10. Plaintiff, on October 5, 1984, attended a session of the St. Louis Board of Aldermen and was interviewed thereafter by certain members of the press.

11. Plaintiff was present at the Board of Aldermen meeting in his capacity as president of St. Louis Fire Fighters Association, Local No. 73, AFL-CIO, the certified representative of certain Fire Department employees. Exhibit A attached hereto is the Certification of Representative issued by the State Board of Mediation, dated September 28, 1977.

12. In response to reporters' questions on October 5, 1984, Plaintiff made certain statements.

13. The St. Louis Post-Dispatch and the South Side Journal newspapers published articles in which Plaintiff was allegedly quoted and in which Plaintiff's comments were discussed.

14. On or about October 16, 1984, Defendant Nash filed a complaint with the Department of Personnel of the City of St. Louis alleging that political threats were made by Plaintiff against Alderman James Shrewsbury. Defendant Nash knew or should have known that Plaintiff's statements were constitutionally protected.

15. Thereafter, on or about December 1, 1984, Plaintiff was served with a subpoena to appear before the Department of Personnel to testify in connection with an investigation.

16. On or about December 13, 1984, Plaintiff appeared before the Department of Personnel and responded to questions posed by William C. Duffe, Director of Personnel.

17. On or about January 28, 1985 Plaintiff was served with notice that a hearing would be held before the Commission in connection with "alleged political threats made by [Plaintiff] against Alderman James Shrewsbury."

18. On or about February 4, 1985 a hearing was held before the Commission, after which the matter was taken under advisement by the Commission.

19. On or about February 18, 1985 the Commission notified Plaintiff that it had concluded Plaintiff violated Article XVIII of the City Charter (attached hereto as Exhibit B) and Rule XV, Section 2(b) of the Civil Service Rules (attached hereto as Exhibit C), that Plaintiff would be suspended for 28 days without pay, and that Findings of Fact, Conclusions of Law and the formal decision of the Commission would be forthcoming.

20. On March 1, 1985, Plaintiff was suspended without pay through and including March 28, 1985.

21. On March 12, 1985, the Commission mailed its final decision, Findings of Fact and Conclusions of Law herein (attached hereto as Exhibit D). [Plaintiff received said final decision on March 13, 1985.]

COUNT I

PETITION TO REVIEW DECISION OF THE CIVIL SERVICE COMMISSION OF THE CITY OF ST. LOUIS

Comes now the Plaintiff, Donald G. Blackwell, and for his Petition to Review the Order and Decision of the Civil Service Commission of the City of St. Louis, states as follows:

22. Jurisdiction of this Court over Count I is invoked pursuant to Section 536.010, R.S.Mo.

23. At all times relevant hereto Plaintiff has been subject to the restrictions of Section 19, Article XVIII of the Charter of the City of St. Louis and Rule IV, Section 2(b) of the Civil Servive Rules and to the jurisdiction of Defendant Commission.

24. The action of the Commission herein is in violation of the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Missouri Constitution in that:

a. Plaintiff was denied his right to notice of what specific actions were forbidden or commanded by Section 19 of Article XVIII of the City Charter and Rule XV, Section 2(b) of the Civil Service Rules which are vague, indefinite, uncertain and insufficient to provide notice pursuant to due process.

b. Plaintiff was denied his right to freedom of speech involving matters of public concern, freedom of association, and freedom to petition the City government for redress of grievances by the unduly restrictive provisions of Section 19, Article XVIII of the City Charter and Rule XV, Section 2(b) of the Civil Service Rules which are not justified by any compelling interest of the City of St. Louis.

c. Plaintiff was denied his right to fair trial because the Commission's rulings on evidentiary and procedural matters were improper and manifestly unjust; the Commission admitted certain evidence which was improper and inflammatory; the effect of the Commission's rulings and admission of said evidence was to deny Plaintiff his rights to due process and a fair trial.

d. Plaintiff was denied his right to an impartial tribunal because the Commission demonstrated on the record a fundamental misunderstanding of the issues before it, a profound personal bias on the issues before it, and an inability to give the Plaintiff a fair hearing.

25. The decision of the Commission is in excess of its statutory authority or jurisdiction.

26. The purported Findings of Fact Nos. III, VI, VII, VIII, IX, X and XI are not supported by competent and substantial evidence upon the entire record but only by evidence which was improper, constituted hearsay, was without proper foundation, was speculative, conjectural, and inconclusive.

27. The purported Conclusions of Law are improper, erroneous, and not supported by competent and substantial evidence upon the whole record or by appropriate Findings of Fact, but only by evidence which was improper, constituted hearsay, was without proper foundation, was speculative, conjectural and inconclusive.

28. The Decision and Order of the Commission are not authorized by law because said decision and order violate the First and Fourteenth Amendments to the United States Constitution, Article 1, Section 10 of the Missouri Constitution, and constitute discrimination against Plaintiff because of his exercise of the rights guaranteed him by Section 105.510, R.S.Mo.

29. The Decision and Order of the Commission were made upon unlawful procedure and without a fair trial.

30. The Decision and Order of the Commission are arbitrary, capricious and unreasonable.

31. The Decision and Order of the Commission constitute an abuse of discretion.

32. For all of the above-stated reasons, and each of them, Plaintiff states that judgment reversing the Commission's Decision and order is amply warranted pursuant to Section 536.140, R.S.Mo. (1978).

33. Plaintiff is entitled to a reasonable allowance for attorney's fees in connection with this action.

WHEREFORE, Plaintiff prays that this Court review the entire record of this proceeding and make its own Conclusions of Law to the effect:

a. That the Decision and Order of the Commission are in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Missouri Constitution;

b. That Section 19 of Article XVIII of the City Charter and Rule XV, Section 2(b) of the Civil Service Rules are void for vagueness in violation of the Fifth and Fourteenth Amendments to the United States Constitution; and Article 1, Section 10 of the Missouri Constitution;

c. That the Decision and Order of the Commission are in excess of statutory authority or jurisdiction;

d. That the Decision and Order of the Commission are not supported by competent and substantial evidence upon the whole record;

e. That the Decision and Order of the Commission are not authorized by law;

f. That the Decision and Order of the Board were rendered upon unlawful procedure and without a fair trial;

g. That the Decision and Order of the Commission are arbitrary, capricious and unreasonable;

h. That the Decision and Order of the Commission involve an abuse of discretion;

enter judgment reversing the Decision of the Commission and dismissing the charges against Plaintiff, with prejudice; reinstate Plaintiff as Battalion Fire Chief, Fire and Fire Prevention Division, Department of Public Safety, effective immediately with back pay and with restoration of all seniority and benefits of his position; strike all reference to this incident from Plaintiff's personnel file; allow Plaintiff reasonable attorney's fees and expenses herein; and grant such further and other relief as to the Court may seem just and proper in the circumstances.

COUNT III

Comes now Plaintiff, Donald G. Blackwell, and for his cause of action pursuant to 42 U.S.C. §1983 against Defendants, William C. Duffe, personally and in his official capacity, and the City of St. Louis, states as follows:

34. Jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1343, 42 U.S.C., Section 1983, and 42 U.S.C., Section 1988 and §527.010 of the Revised Statutes of Missouri.

35. The actions of Defendants Nash, Keller, Bischoff, Schmid, Duffe and Defendant City were taken under color of the statutes, ordinances, regulations, custom and usage of the State of Missouri and its subdivision, the City of St. Louis.

36. The actions of Defendants Nash, Keller, Bischoff, Schmid, Duffe and Defendant City were taken pursuant to and in implementation of the official policies, ordinances and regulations adopted and promulgated by Defendant City of St. Louis.

37. Defendants City of St. Louis and Duffe, in promulgating, maintaining and enforcing Section 19 of Article XVIII of the Charter of the City of St. Louis, and Rule XV, Section 2(b) of the Civil Service Rules, against Plaintiff and other classified employees, and in suspending Plaintiff for 28 days because of his activities at the meeting of the Board of Aldermen on October 5, 1984, are intentionally violating, interfering with, and chilling the exercise of the rights of Plaintiff and other classified employees to freedom of speech, freedom of assembly, and freedom to petition the City government for redress of grievances under the First Amendment to the United States Constitution.

38. The actions of Nash, Keller, Bischoff, Duffe and Defendant City were taken intentionally in retaliation against Plaintiff for the exercise of his right to freedom of speech, freedom of association and freedom to petition the City government for the redress of grievances protected by the First Amendment to the United States Constitution.

39. The actions of Defendants Nash, Keller, Bischoff, Duffe and Defendant City deprived Plaintiff of his right to freedom of speech to comment on matters of public concern, his right to freedom of association and his right to petition the City government for redress of grievances under the First Amendment to the United States Constitution without justification by any compelling interest of the City of St. Louis.

40. As a result of the actions of Defendants Duffe and City of St. Louis, Plaintiff has been stigmatized, has lost wages and benefits of employment, has suffered emotional distress, humiliation and embarrassment.

41. As a result of the actions of Defendants Duffe and City of St. Louis, Plaintiff was required to incur reasonable attorney's fees in responding to the subpoena to appear before the Department of Personnel, in successfully seeking review of the action of the Civil Service Commission, and in successfully resisting the appeal of Defendant City of St. Louis from the favorable Circuit Court ruling.

42. Plaintiff is entitled to recover his reasonable costs herein, including attorney's fees, pursuant to 42 U.S.C. Section 1988.

WHEREFORE, Plaintiff prays that this court enter judgment for Plaintiff against Defendants Duffe and City of St. Louis, jointly and severally; declare that Defendants have violated Plaintiff's constitutional rights; order said Defendants to compensate Plaintiff for his lost wages and benefits of employment; award Plaintiff actual damages for his emotional distress, humiliation and embarrassment in an amount which is fair and reasonable; order said Defendants to pay to Plaintiff his reasonable attorney's fees and costs herein; and for such other and further relief as this Court deems just and proper.

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. . . . . .

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Attorneys for Plaintiff

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

DONALD G. BLACKWELL,
Plaintiff,
vs.
CITY OF ST. LOUIS, et al.,
Defendants.

Cause No. 854-00083
Division No. 2

JOINT ANSWER OF DEFENDANTS CITY OF ST. LOUIS AND WILLIAM C. DUFFE TO PLAINTIFF'S SECOND AMENDED PETITION

Come now defendants City of St. Louis and William C. Duffe, and for their answer to Plaintiff's Second Amended Petition, plead as follows:

COUNT I

1. Defendants make no answer to Count I of Plaintiff's Second Amended Petition for the reason that no answer thereto is required by Chapter 536 R.S.Mo., and further, inasmuch as said cause of action is not applicable to defendants, and further, because said cause of action has been finally disposed of.

COUNT III

Admissions and Denials

1. Defendants admit that plaintiff is, and at all times pertinent hereto was, a citizen of the United States; a resident of the City of St. Louis, State of Missouri; an employee of the City of St. Louis, holding a position in the classified service as Battalion Fire Chief, Fire and Fire Prevention Division, Department of Public Safety. Defendants deny that plaintiff is currently so employed. Defendants are without sufficient knowledge to form a belief as to the truth of

the remainder of the allegations set forth in Paragraph 1 of Plaintiff's Second Amended Petition and, therefore, deny same.

2. Defendants admit the allegations set forth in Paragraph 2 of Plaintiff's Second Amended Petition, but note that the Commission is not authorized to hold hearings on matters involving the discipline and dismissal of all classified employees.

3. With regard to Paragraphs 3, 4 and 5 of Plaintiff's Second Amended Petition, Defendants admit that Cyrus S. Keller, Neil N. Bischoff and James P. Schmid were, at all times relevant hereto, the chairman, vice-chairman and member, respectively of the Civil Service Commission.

4. Defendants admit the allegations set forth in Paragraphs 6, 7 and 8 of Plaintiff's Second Amended Petition, except that Thomas Nash is not presently Director of Public Safety.

5. Defendants deny the allegations set forth in Paragraph 9 of Plaintiff's Second Amended Petition.

6. Defendants admit the averments of paragraph 10.

7. Defendants admit the averments of paragraph 11, except that they are without sufficient knowledge or information to form a belief as to the "capacity" in which plaintiff was present at the meeting, and therefore deny the averment regarding plaintiff's capacity.

8. Defendants admit the allegations set forth in Paragraphs 12 and 13 of Plaintiff's Second Amended Petition.

9. Defendants admit the allegations set forth in Paragraph 14 of Plaintiff's Second Amended Petition, with the exception of the last sentence thereof, which Defendants deny.

10. Defendants admit the allegations set forth in Paragraphs 15, 16, 17, 18, 19 and 20 of Plaintiff's Second Amended Petition.

11. Defendants admit the allegations set forth in Paragraph 21 of Plaintiff's Second Amended Petition, with the exception that Defendants are without sufficient knowledge to form a belief as to the truth of the allegation set forth in the last sentence of said Paragraph 21 and, therefore, deny same.

12. Defendants deny the averments of Paragraphs 34, 36, 37, 38, 39, 40, 41, and 42.

13. Defendants admit the averment of Paragraph 35.

Affirmative Defenses

14. Plaintiff has made a final election of remedies by pursuing Count I of his petition to final judgment in that Count I and Count III are based upon the same set of facts, to-wit: plaintiff's suspension and the facts attendant to his suspension.

15. The judgment of the Court disposing of Count I, entered November 8, 1985, affirmed by the Missouri Court of Appeals in **Blackwell v. City of St. Louis,** 726 S.W.2d 760 (Mo. App. 1977) estops plaintiff's claim against the City of St. Louis in that it establishes that the policies of the City of St. Louis do not forbid the conduct for which plaintiff was disciplined.

16. Defendant Duffe is immune for the actions alleged in the petition since those actions were taken by defendant in his capacity as Director of Personnel of the City of St. Louis and defendant neither knew nor reasonably should have known that the actions he took would violate plaintiff's constitutional rights.

Other Defenses

17. The petition fails to state a claim upon which relief can be granted.

JAMES J. WILSON, CITY
COUNSELOR #18356

. . . . . .

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City of St. Louis and
William C. Duffe
314 City Hall
St. Louis, MO 63103
622-3361

Copy of the foregoing mailed this 4th day of April, 1988 to Jerome A. Diekemper, Attorney for Plaintiff, 7730 Carondelet, Suite 222, St. Louis, MO 63105 and Julius H. Berg, Attorney for Defendants Civil Service Commission, Keller, Schmid and Bischoff, 7777 Bonhomme, Clayton, MO 63105.

. . . . . .

RULE XV

DISCRIMINATION & POLITICAL ACTIVITY

Section 1. DISCRIMINATION IN EMPLOYMENT:

No person shall be appointed to a position in the classified service, nor be demoted, reemployed, promoted, removed, increased or decreased in pay, nor in any other way be favored or discriminated against in any matter within the purview of Article XVIII because of his or her race, color, national origin, political or religious affiliations or beliefs, sex, age or physical disability, except when specific sex, age and physical requirements are bona fide qualifications for the position or when an employee is retired because he or she has reached mandatory retirement age.

Section 2. POLITICAL ASSESSMENTS AND CONTRIBUTIONS:

(a) No person in a competitive position in the classified service shall be under any obligation to any political fund or render any political service, and no such person shall do so or be removed or otherwise prejudiced or discriminated against in any matter under the purview of Article XVIII for refusing to do so.

(b) No person in an excepted position in the classified service shall solicit contributions for any political party or campaign from any person in a competitive position in the classified service.

Section 3. POLITICAL SPEECHES, CAMPAIGNING AND ACTIVITY:

(a) No person holding an excepted position in the classified service shall use his or her official authority or influence to coerce or influence the political action of any person in the competitive service, or shall seek or accept nomination, election, or appointment as an

officer of a political party elected by popular ballot, or shall conduct an active campaign for election to any public office unless he or she shall first resign from his or her position.

(b) No person in a competitive position in the classified service shall use his or her official authority or influence to coerce the political action of any person or body, or to interfere with any election, or shall take an active part in a political campaign, or shall seek or accept nomination, election, or appointment as an officer of a political club or organization, or serve as a member of a committee of any such club or organization, or circulate or seek signatures to any petition provided for by any primary or election law, or act as a worker at the polls, or distribute badges, color or indicia favoring or opposing a candidate for election or nomination to a public office whether federal, state, county, or municipal. But nothing in this subsection shall be construed to prohibit or prevent any such person from becoming or continuing to be a member of a political club or organization or from attendance upon political meetings, from enjoying entire freedom from all interference in casting his or her vote, from expressing privately his or her opinions on all political questions, or from seeking or accepting election or appointment to public office, provided, however, that no active campaign for election shall be conducted by any employee unless he or she shall first resign from his or her position.

(c) Members of the Civil Service Commission shall comply with the rules regarding political contributions, campaigning, and activity in accordance with the provisions of these rules applicable to persons occupying competitive positions in the classified service.

Section 4. POLITICAL INFLUENCE AND COERCION:

No person, while holding any City office or employment in the excepted or competitive service, or while in nomination or seeking nomination to appointment to any office, shall corruptly use or promise to use, directly or indirectly, any official authority or influence, possessed or anticipated, to confer upon any person, or to secure or aid any person in securing any office or public employment, or any nomination, confirmation, promotion, or increase of salary upon the consideration or condition that the vote or political influence or action of any person shall be given or used in behalf of any candidate, officer, or party, or upon any other corrupt condition or consideration. No person holding a position in the excepted or competitive service shall favor or discriminate against any employee in any matter under the purview of Article XVIII on the basis of the employee's political affiliations, beliefs, or actions. No person, being an officer of the City or holding any position in the competitive or excepted service, or having or claiming to have any authority or influence in relation to the nomination, employment, confirmation, promotion, removal, or increase or decrease in salary of any employee, shall corruptly use or promise or threaten to use any such authority or influence, directly or indirectly, to coerce or persuade the vote or political action of any person, or the removal, discharge, or promotion of any employee of the City.

Section 5. VOTING:

On any election day which is not a state or national holiday, the offices of the City shall remain open for business. All employees shall be entitled to vote and whenever necessary may be granted paid time off actually required to vote. The total period of time allowed to an employee for the purpose of voting, including any necessary paid

time off, shall not exceed the minimum period of voting time required by the Revised Statutes of the State of Missouri.

Section 6. VIOLATIONS; PENALTIES:

In every case where it shall come to the attention of the Director that any employee in the classified service, subject to Article XVIII and these rules, has engaged in political or other activities forbidden under these rules and Article XVIII, he shall conduct an investigation and upon the completion of the same present his findings to the Commission at its next regular meeting thereafter. The Commission, following a review of the findings, may conduct a complete investigation and hearing; if the Commission finds that the employee has been guilty of a violation of the act and these rules, it shall order immediate dismissal of the employee and shall instruct the Director to so inform the Comptroller. (Rule XV, Sections 2, 3, & 4 amended by Civil Service Commission March 3, 1981.)

No. 89-1299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DON G. BLACKWELL,
Petitioner,

vs.

THE CITY OF ST. LOUIS,
and WILLIAM C. DUFFE,
Respondents.

On Petition for Writ of Certiorari to the
Missouri Court of Appeals, Eastern District

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents The City of St. Louis and William C. Duffe respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the Missouri Court of Appeals, Eastern District, in this case. That opinion is reported as *Blackwell v. City of St. Louis,* 778 S.W.2d 711 (Mo. App. 1989).

STATEMENT OF THE CASE

Respondents incorporate by reference the statement of facts in the opinion below (Pet. App. A-2 - A-4), which is fair and evenhanded.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner presents five reasons why he believes that this Court ought to grant review: 1) that the decision below determined a federal question in a way that conflicts with applicable decisions of this Court; 2) that the decision below determined a federal question in a way that conflicts with decisions of federal courts of appeal; 3) that the decisions below determined a federal question in a way that conflicts with the decisions of other state courts of last resort; 4) that there is a need for additional guidance from this Court; and 5) that the court below engaged in a novel and unprecedented approach. There is, however, no special and important reason to grant review.

1. The Court Below Did Not Decide The Federal Question In A Way That Is In Conflict With Applicable Decisions Of This Court.

Petitioner argues that the decision below is in conflict with this Court's decisions in *Jett v. Dallas Independent School District,* 491 U.S. ____, 105 L.Ed.2d 598, 109 S.Ct. ____ (1989); *City of St. Louis v. Praprotnik,* 485 U.S. ____, 99 L.Ed.2d 107, 108 S.Ct. ____ (1988); *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986); and *Owen v. City of Independence,* 445 U.S. 622 (1980). It is not.

Petitioner asserts that these cases establish that a city is liable for the acts of its final policymakers; petitioner asserts that The City of St. Louis's final policymaker is the civil service commission; therefore, petitioner concludes, The City of St. Louis is liable, under these precedents, for the act of the civil service commission.

Petitioner's conclusion is false because he reads the Court's decisions too broadly; the Court has not held that a city is liable for all of the acts of its final policymakers, even in the area of city business where the final policymakers have the authority to make city policy. A policy is still required, and an act, even by a

policymaker, is not liability engendering, unless the act is taken pursuant to a policy.

The Court's holdings on the issue are most clearly set forth in *Praprotnik*. Justice Brennan argued, like petitioner here, that the policy inquiry is superfluous: all that is required is that the unconstitutional act be that of a final policymaker. *Praprotnik,* (Brennan, J., concurring), 99 L.Ed.2d at 128 n.3. But the plurality rejected that view, holding instead that "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business." *Praprotnik,* 99 L.Ed.2d at 118 (emphasis in original). The plurality did not construe *Owen* as holding that a city could be held liable for the isolated act of the City's policymaker, as petitioner construes *Owen;* rather, the plurality construed *Owen* as evidencing an assumption that a policy could be inferred from such a decision. *Praprotnik,* 99 L.Ed.2d at 117. Policy remained the *sine qua non* of municipal liability.

The holding of the *Praprotnik* plurality is consistent with the statement by the *Pembaur* plurality that liability may be imposed only where there has been "a deliberate choice to follow a *course of action . . .*," *Pembaur,* 89 L.Ed.2d at 483 (emphasis added), and the *Praprotnik* plurality opinion was adopted by a majority of the Court in *Jett. Jett,* 105 L.Ed.2d at 627-628. It is the law, then, that it is a municipal policy, not an act by a municipal policymaker, that stands as a prerequisite to the imposition of municipal liability pursuant to §1983.

The court below faithfully applied these holdings to an unusual situation. Typically, where a final policymaker acts in his area of final policymaking authority, the policymaker's act will be taken pursuant to a policy that the policymaker has made, even if the policy was made contemporaneously with the policy's execution. That is why the Court has assumed that an inference may be drawn from a policymaker's act that there was

a policy. But the peculiar status of the civil service commission makes impossible the drawing of such an inference in the circumstances of this case.

In *Kirby v. Nolte,* 164 S.W.2d 1 (Mo. banc 1942), the Supreme Court of Missouri described the duties of the civil service commission as "mainly quasi-legislative or judicial." *Id.*, 164 S.W.2d at 9. See also Appendix, A-13. This description is accurate: as a quasi-legislative body the commission establishes rules; as a quasi-judicial body the commission determines whether or not the rules have been broken. The commission's decision to suspend petitioner was made in the commisison's quasi-judicial capacity: after a hearing, on the record, at which petitioner was represented by counsel, cross-examined witnesses, and testified, the commission rendered findings of fact, conclusions of law, and a decision, albeit mistaken, that plaintiff had violated a civil service rule and a city charter provision that the rule replicated.

That the City's charter places the rule-making authority in the same officials with whom it places the hearing function is purely adventitious: the two functions could as easily have been placed with separate officials or commissions. If the functions had been separated, no one would contend that an adjudication by the hearing tribunal of whether or not there was a violation of a rule promulgated by the rule-making body is a policy any more than anyone would contend that a municipal court's adjudication of innocence or guilt on an ordinance violation is a city policy. If it were, each time a court makes a determination as to whether or not a statute promulgated by a legislature has been violated, the court would be making policy. This would be a completely unreasonable result. When a judicial body makes an adjudication, it determines whether a particular act has run afoul of a course of action chosen by the legislature; when the civil service commission made its adjudication here, it determined whether petitioner had run afoul of a course of action chosen by the people of the City of St. Louis when they added the civil

service article, with its limitations on political activity, to the city's charter. The commission, by determining that petitioner had violated those limitations, was not making city policy. The commission did not answer the question that is the essence of policy: what ought the city do? Rather, the commission answered the question that is the essence of adjudication: what did petitioner do? That is why the court below was able, the first time it had the case, to reverse the commission's decision to suspend petitioner, finding that the commission had erred in finding that petitioner had violated the city's policy. *Blackwell v. City of St. Louis,* 726 S.W.2d 760 (Mo. App. 1987).

The court below faithfully and correctly applied this court's precedents.

2. **The Petition Does Not Show That There Is A Conflict Between The Decision Below And Decisions Of Any Federal Court Of Appeals.**

In part I(B) of his argument petitioner cites a number of cases from the federal courts of appeals where a court held that a city could be held liable for a decision by a city's final policymaker. However, the court below did not deny that a city could be held liable for a decision made by a policymaker; the court did no more than insist that a liability-engendering decision must have the quality of a policy rather than the quality of an adjudication. If any of the decisions petitioner cites holds otherwise, petitioner has failed to show that this is so.

3. **The Petition Does Not Show That The Decision Below Is Inconsistent With That Of Any Other State Court Of Last Resort.**

Petitioner contends that the decision below conflicts with an appellate court decision in Minnesota and with one in Texas. Not only does petitioner fail to demonstrate wherein there is such a conflict, petitioner fails to demonstrate that either appellate court is a court of last resort.

4. **The Petition Does Not Demonstrate The Need For Additional Guidance From This Court.**

In part II of his petition, petitioner contends that there is a need for additional guidance from this Court. This reason for granting review does not correlate with anything in Supreme Court Rule 17, unless petitioner is obliquely referring to the consideration given a petition which concerns an important question of law which has not been, but should be, settled by this Court. See Sup. Ct. R. 17.1.(c). In any case, other than petitioner's *ipse dixit* that the state of the law in this area is confused and infected with widely varying judicial resolution, there is no demonstration that there is such confusion. Indeed, it was just this past year that a majority of the Court endorsed a mode of analysis for municipal liability cases. See *Jett,* op. cit. There has not yet been sufficient time to judge whether petitioner is correct in his forecast that the decision will cause confusion. Certainly, there is no presumption that it will, and the Court ought not presume that it will.

5. **The Petition Does Not Demonstrate That The Purportedly Novel And Unprecedented Approach Of The Missouri Court Of Appeals Is A Special And Important Reason Why The Writ Should Be Granted.**

In part 3 of petitioner's argument, petitioner contends that the Court should grant the petition because of the novel and unprecedented approach taken below. If by novel and unprecedented, the petitioner refers to the court of appeals' recognition that a policy is required as a precondition of liability even where the actor is a policymaker, he is wrong. See *Morgan v. Tice,* 862 F.2d 1495 (11th Cir. 1989) (not enough that official be a final policymaker; must be a policy). If by novel and unprecedented petitioner refers to the court of appeals' recognition of the civil service commission's dual role and the court's consideration of the quality of the particular decision, he may be right. But if he is right, he is right because it is an unusual

situation. And there is nothing in Rule 17 that suggests that the Court should grant review to consider novel solutions to unusual problems. To the contrary, unusual situations, not likely to be repeated, hardly are the kind that this Court's resources ought to be expended upon.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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